Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 78-6

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT

* * *

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June, 1978

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HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES; JEROME CHAPMAN,INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; GENE LEGE, INDIVIDUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE MONTGOMERY COUNTY WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellants,

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees.

* * * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * * *

JURISDICTIONAL STATEMENT

* * * *

Appellants appeal from the Amended Judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on March 8, 1978 (App. C, Vol. I, p. A-40), which among other holdings, declared Sections 11.10, 11.15, 17.02, and 34.06 of Title 2 of the Texas Family Code unconstitutional either on their face or as applied and permanently enjoined the use of these and other provisions of the Texas Family Code by Appellants. Appellants submit this Jurisdictional Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the three-judge District Court for the Southern District of Texas, Houston Division (App. A, Vol. I, p. A-1), is reported at 438 F.Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

On April 19, 1976, this suit was brought under 42 U.S.C. §§ 1981 and 1983 and under 28 U.S.C. §§1331, 1343, 2201, and 2202. Although in the strictest sense jurisdiction was not contested below, Appellants do now point out, and will subsequently brief at the appropriate time, that 42 U.S.C. § 1981 and 28 U.S.C. §1331 have no applicability to this cause. Similarly, Appellants deny that the Declaratory Judgment Act, §§ 2201 and 2202 of Title 28 creates jurisdiction in this or any other case. The only possible basis for jurisdiction of the District Court is 42 U.S.C. § 1983 and 28 U.S.C. § 1343; however,

Appellees failed to state any claim under those statutes upon which relief could be granted. Pursuant to 28 U.S.C. §§ 2281 and 2284, as they then existed, a three-judge court was convened to determine the constitutional issues raised by Plaintiffs. The Judgment of the District Court (App. B, Vol. I, p. A-34) was entered on February 23, 1978. Notice of Appeal (App. E, Vol. I, p. A-67) was filed in the District Court on April 20, 1978.

In a motion filed in the District Court, Appellants requested that the injunction be stayed pending appeal from the Amended Judgment to this Court (App. F, Vol. I, p. A-72). On March 15, 1978, the District Court denied that Motion for a Stay (App. F, Vol. I, p. A-72). In an application filed with the Honorable Lewis F. Powell, Jr., Circuit Justice for the Fifth Circuit, Appellants requested that certain portions of the injunction be stayed while the appeal to this Court was pursued (App. G, Vol. I, p. A-78). On March 29, 1978, Associate Justice Powell denied that Application for a Stay (App. G, Vol. I, p. A-78). In an application mailed on June 6, 1978, to the Honorable William H. Rehnquist, Associate Justice of the United States Supreme Court, Appellants requested that one specific portion of the injunction be stayed while the appeal to this Court was pursued (App. H, Vol. I, p. A-87). As of this date, no ruling has been received regarding this new application for a stay.

STATUTES INVOLVED

The validity of Sections 11.10, 11.15, 17.02, and 34.06 of Title 2 of the Texas Family Code are involved in this appeal. The affected provisions and other relevant portions of the Texas Family Code (App. I, Vol. II, p. A-131), and applicable rules of the Texas Rules of Civil Procedure (App. J, Vol. II, p. A-182) are included in the accompanying appendices.

QUESTIONS PRESENTED BY THE APPEAL

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

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C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' TIMELY HEARINGS

E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

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A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY

THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM, FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

STATEMENT OF THE CASE

In this litigation Plaintiffs, John and Mary Sims (hereafter referred to as "the Simses"), contend that major portions of Title 2 of the Texas Family Code (hereafter referred to as "the Code") which are designed to protect children from abuse and neglect are unconstitutional infringements of family integrity. Defendants, officers and employees of the Texas Department of Human Resources (formerly the State Department of Public Welfare and hereafter referred to as "the Department") received on March 25, 1976, a report of physical abuse to a child, Paul Sims, and dispatched a worker, Rex Downing, to investigate the report. Mr. Downing found visible physical injury to eight-year-old Paul and learned that the injuries were inflicted when Mr. Sims came to Osborne Elementary School in Houston,

Texas, where Paul was a student, and savagely beat the child. The boy had also been beaten on the previous night by Mrs. Sims.

In order to protect Paul and his two young sisters from further harm and to determine the extent of their injury, the Department took the children into temporary custody and had them examined by a physician. The doctor found all three children were battered. Paul was injured to such an extent that he had to be admitted to St. Joseph's Hospital where he was treated for eleven days.

After taking protective custody of the children, Mr. Downing met with supervisory personnel at the Department that afternoon and the group decided that a suit for protection of a child in an emergency under Section 17.02 of the Code should be filed in Houston, Harris County, Texas, where the children were found. The suit was filed in the District Court of Harris County on March 26, 1976, the day after the children's removal. Judge Robert Lowry issued an emergency ex parte order appointing the Department temporary custodian of the children (Section 17.04 provides for these emergency orders). The statute does not require service on the parents, at this emergency stage of the proceedings, Section 17.03, and none was made. The Simses had actual knowledge of the suit and retained an attorney on the day the suit was filed.

On March 31, 1976, the Simses appeared personally and through their attorney who submitted a motion to modify the order. A hearing on such a motion is statutorily mandated but Judge Lowry was temporarily absent and the motion was not filed by the court clerk, who returned it to the Simses' attorney. Instead of pursuing a hearing on the motion, the Simses filed a petition for a writ of habeas corpus. At a hearing on the habeas petition held April 5, 1976, Judge Lowry

determined that the children were residents of Montgomery County, Texas, and verbally transferred the proceedings to the district court in Montgomery County. The Simses' attorney pursued that habeas action no further.

The Department, seeking continued custody of the children so that further investigation and work with the family could be done prior to any final disposition of the case, filed a suit affecting the parent-child relationship in Judge Lowry's court that afternoon. The Judge issued a temporary restraining order continuing temporary custody in the Department and transferred the suit to Montgomery County where the children resided and continuing jurisdiction lay. (See Sections 11.04, 11.05, and 11.06 of the Code.)

The Simses and their attorney had actual knowledge that the court had decided that the children resided in Montgomery County and that any suit affecting their relationship to their parents was in the continuing jurisdiction of that court. On April 9, 1976, when the Sims file was received in Montgomery County District Court, John Davis, a juvenile probation officer in Montgomery County, tried unsuccessfully to find the Simses. The Simses' attorney was notified that the suit was pending in Montgomery County and that a hearing had been set for May 8, 1976; citation was not issued. At no time did the Simses ask for an earlier hearing or seek mandamus directing a hearing.

On April 19, 1976, the Simses filed this cause in the United States District Court for the Southern District of Texas, Houston Division. The Simses' application for a temporary restraining order in their cause in the federal district court was denied by Judge John Singleton on April 20, 1976. A hearing on their application for a temporary injunction was set for April 29 and later reset for May 5. When the Department

received notice on April 22, 1976, of the suit in federal court, state court proceedings were suspended foreclosing the state's opportunity to resolve the matter. The Simses returned to state court and filed on May 4, 1976, a motion for leave to file an original petition for writ of habeas corpus with the Court of Civil Appeals of the State of Texas, Fourteenth Supreme Judicial District. The motion was denied for want of jurisdiction.

At the hearing on May 5, Federal District Judge Singleton found the children were not legally in the Department's custody because the temporary orders issued by the state court had expired by operation of law. (See Sections 17.04 and 11.11(b) of the Code and Rules 680 and 681 of the Texas Rules of Civil Procedure.) Thereupon, Judge Singleton ordered the children returned immediately to their parents and determined that the Department was *not* enjoined from taking proper action to gain custody of the children.

The Department filed a new suit in Montgomery County on May 14 seeking custody of Paul Sims. Under this new suit, Judge Ernest Coker, Sr., issued a show cause order and a writ of attachment ordering that Paul Sims be delivered to the temporary care of his maternal grandparents (by adoption), Mr. and Mrs. James Carter. A show cause hearing was set for May 21, but the Simses avoided service of citation and attachment by absenting themselves from residence, school, and place of employment until May 21, therefore, the hearing was reset for June 21.

Meanwhile back in federal court, the Simses filed a second application for a temporary restraining order without notice to the Department and this time Judge Singleton issued, in apparent violation of Rule 65(b)(2), F.R.C.P. and 28 U.S.C. §§ 2281 (repealed Aug. 12, 1976) and 2284(3), an ex parte order forbidding the attachment. When the requested three-judge court was

constituted, a hearing was held on June 7. At the hearing, a preliminary injunction which prohibited further proceedings in state court pending a final hearing on the merits in federal court was issued. Trial on the merits on October 26, 1976, resulted in judgment for Plaintiffs.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal is important because fifty states have child abuse statutes similar to those declared unconstitutional by the three-judge court (App. L, Vol. III, p. A-220) and the effect of the court's order is to put battered children back with their parents in danger of serious harm and, in some cases, in danger of their lives.

The court's order that emergency ex parte hearings be held on the very day of a child's removal from his parents' custody is not required by due process and is a practical impossibility in many parts of this and other states where courts are itinerant, great distances exist between the place where the child is found and the place where a judge resides or sits, and children are removed on holidays and weekends. Appointment of an attorney ad litem for a child at the emergency ex parte hearing is not required by due process and may be too expeditious to be effective. Proof by clear and convincing evidence in suits affecting the parent-child relationship is not required by commonly accepted beliefs and custons as well as by statutory and constitutional law which make evidence difficult to amass.

Substantial issues presented involve family law and could best be handled by state courts. The three-judge court should have abstained because proceedings in which all the constitutional questions properly raised in this suit could have been decided were pending in state court at the time this suit was brought in federal court.

Further, many issues involving the constitutionality of state statutes decided by the three-judge court were not justiciable.

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

The long-established rule that federal courts will not enjoin state court proceedings controlled in the instant case and required abstention. *Younger v. Harris*, 401 U.S. 37 (1971). Standards of equitable restraint when federal courts are requested to interfere with state court civil functions go far beyond the stringent standards of private equity jurisdiction. *Huffman v. Pursue*, 420 U.S. 592, 603 (1975). In addition to finding that a federal plaintiff has no adequate remedy at law and will suffer great and immediate irreparable injury if equitable jurisdiction is denied, the federal court must consider notions of comity which are basic to our federalism. Comity posits that the national sovereign fares best when the states and their institutions are left to perform their separate functions. *Huffman, supra*, at 601; *Younger v. Harris, supra* at 44. The balance struck between state and federal courts is especially delicate when the federal court is asked to declare a state statute unconstitutional. Even a showing that a statute on its face violates rights protected by the Constitution will not justify a federal injunction to prevent a state's good faith attempts to enforce its constitutionally infirm statute. *Huffman, supra*, at 602; *Younger, supra*, at 49 and 53; *Watson v. Buck*, 313 U.S. 387 (1941). Absent a showing of bad faith prosecution or harrassment by the state in bringing suit or some equally egregious and extraordinary circumstances which will result in irreparable damages to the person being sued by the state, a federal court wrongfully exercises its equity jurisdiction to enjoin state court proceedings. *Younger, supra*, at 54.

I. A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

At the time of the filing of this proceeding in federal court, Appellees had an opportunity to present their federal claims in a suit pending in state court, and no more is required to invoke *Younger* abstention, *Juidice v. Vail*, 430 U.S. 327, 336-337 (1977). The three-judge court dealt with abstention as a threshold issue and concluded that *Younger* principles did not apply. Two reasons were offered to justify this conclusion: "the nature of the state action and the nature of the plaintiff's (sic) challenge." *Sims v. State Department of Public Welfare*, 438 F. Supp. 1179 (S.D. Tex. 1977).

Characterizing the state action as "multifaceted," the court said that the dispute between Appellees and the State of Texas would involve more than a single state judicial proceeding in which Appellees could raise their constitutional defense. *Sims, supra*, at 1187.

This Court's interpretation of inability to defend in a single proceeding in state court was demonstrated in its application of that exception to the *Younger* rule against enjoining of state court proceedings in the case of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There, Negro citizens were harrassed by repeated arrests, seizures, and threats of prosecution. None of the prosecutions was intended to be carried to its judicial conclusion. Each was brought to intimidate, not to permit resolution in the state courts. Because many suits had been and would be brought and none would be pursued to judgment, the federal plaintiffs would be unable to defend themselves in a single suit in state

court, not because their complaint was multifaceted and would require multiple defenses.

Multifaceted litigation can be effectively tried in state court proceedings. Indeed, state courts are often less pressed by time constraints caused by overcrowded dockets and thus, can better deal with extensive discovery and lengthy development at trial than can three-judge federal courts which require the attendance of three busy jurists who are frequently unable to spend the time necessary to allow full development of the facts in multifaceted litigation. Multifaceted state action which allegedly violated Appellees' right to privacy under the United States Constitution and improperly impinged on their right to family integrity could be raised as a defense or as a counterclaim in a single proceeding in state court.

While it is true that two suits were pending in the state courts prior to the federal court's taking any action of substance in this cause, the court found that neither of them was brought for harrassment. The first suit filed in Harris County and transferred to Montgomery County was pending when the court below issued a temporary restraining order returning the children to Appellees. At that time, the court expressly instructed Appellants that the temporary restraining order did not prevent their taking steps properly to seek custody of the children in appropriate judicial proceedings. *Sims, supra* at 1185. Appellants then filed a second suit in Montgomery County. Both suits sought the same relief; a final decision on the merits in either would have rendered the other res judicata. Under these circumstances, the pendency of two suits in state court did not mean that Appellees could not defend themselves in a single proceeding in state court.

In the section of its opinion in which it characterized

the state action in *Sims* as multifaceted, the court pointed out that:

> Many of the challenged actions taken by the state do not and will not involve any judicial proceeding. *Sims, supra*, at 1187.

To illustrate non-judicial application of a statute, the court described the child-abuse reporting system. *Sims*, n. 5, *id.* The illustration is not illuminating. The application of statutes without judicial involvement seems unlikely to make state action mysteriously or uncommonly multifaceted. It would appear normal, even desirable, for almost every statute to be applied without judicial involvement. The lack of initial judicial involvement is not an extraordinary circumstance which should permit a federal court to find an exception to *Younger* under which it may enjoin state court proceedings.

The three-judge court found procedures for emergency removal of a child from his parents' custody "patently and flagrantly violative of basic constitutional guarantees." *Sims, supra*, at 1192 and n. 1 at 1183. Immediately thereafter, the court narrows, interprets, and rewrites the provisions it found constitutionally infirm.

Finally, the court found substantial portions of the Code unconstitutional on their face, and permanently enjoined Appellants from applying and enforcing them. *Sims, supra*, at 1195. The preceeding directives of the court made it unmistakably clear that Appellants were in fact enjoined only from applying the portions except as the court set out. However zealous the court might have been and even if it spoke in hyperbole, it clearly did not prohibit the use of all existing statutory procedures to remove children from immediate danger until a proper rewriting of the statute. (See discussion of

Dombrowski, supra, in *Younger, supra*, at 51-54.) The district court's modifications of the challenged statutory provisions negated its characterization of any of the offensive provisions as "patently and flagrantly violative of basic constitutional guarantees."

As further basis for its assertion that an injunction was appropriate, the district court found highly unusual circumstances brought this case within exceptions set out by this Court in *Younger* and *Trainor v. Hernandez*, 431 U.S. 422 (1977), and found these circumstances compelled the court to grant equitable relief. The court said:

> ...the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time ... justify equitable relief even if *Younger* principles did apply. *Sims, supra*, at 1188.

Though this Court has not set a rigid rule defining extraordinary circumstances which allow enjoining of state court proceedings, the exceptions devised under *Younger* clearly infer intentional violation of federally protected constitutional rights is required. Bad faith prosecution, harrassment, and statutes obviously written in wanton disregard of the Constitution as interpreted by this Court are examples of extraordinary situations which permit a federal court to enjoin proceedings in state courts. No such knowing or deliberate disregard of Appellees' constitutional rights was found credible by the court below or could have been found credible by any reasonable person.

Assertions, or even proof, that mistakes, errors, and confusion abounded in the state court's management of the early stages of the proceedings pending there cannot be said to rise to the extraordinary circumstances that *Younger* admits as exceptions to its rule. The federal

court could not act as a "primary and powerful" source of vindication of federally protected rights and allow deliberate disregard of federal law, nor could federal courts act as proponents of comity and our federal system if they intervened in state court proceedings because state proceedings were initially inept or incorrect or state agencies bungled. Unfortunately, it cannot be honestly said that judicial confusion, delay, and error is a malady confined to state courts; issuing an injunction on the basis of these unextraordinary circumstances clearly contravenes *Younger* principles. Since harrassment, bad faith prosecution, the necessity of defending in multiple suits in state court, flagrant or patent statutory violations of the Constitution, and other extraordinary circumstances were absent in the instant cause, *Younger* principles applied in full force and the federal court should have abstained from enjoining state court proceedings.

I. B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

Here as in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975), the state brought proceedings in state court "to protect the very interests which underlie its criminal laws." The resulting threat to our federal system caused by federal court intervention in state court proceedings is as grave when the state institutes civil proceedings to enforce its substantive policies as when the state prosecutes under its criminal laws. *Huffman, supra*, at 604.

While pending state proceedings in this case were civil, the child abuse statutes challenged in this action and being enforced in the state proceeding are designed to protect children from dangerous adults, who, as in this case, often are their parents. This protective

purpose of child abuse legislation is closely akin to that underlying criminal statutes. Criminal statutes are merely more inclusive in their protective function; they protect society from dangerous individuals. Both types of statutes regulate by defining proscribed behavior, giving notice that the described behavior is prohibited, and by setting penalties for engaging in the prohibited behavior.

Substantive state policies undergird child abuse statutes. Although parents are rarely criminally prosecuted for assaulting or battering their children unless their conduct results in the child's death, constitutes sexual abuse so egregious that the community or other children unrelated to the offending adult are threatened, the analogy to criminal statutes remains applicable. (See Texas Penal Code, Section 22.04 for criminal statute pertaining to injury to a child.) But for the deference given to the parent-child relationship, adults who physically injure children would routinely be punished under appropriate criminal statutes.

Another similarity between criminal proceedings and these civil proceedings is the availability of habeas corpus. Enforcement of child abuse statutes often gives rise to parents' seeking writs of habeas corpus to gain possession of a child illegally detained by one not entitled to his custody. The availability of habeas proceedings gives the parent two methods of bringing constitutional claims before the court as in criminal cases. (Habeas discussed in *Huffman, supra*, at 605 and 606.)

It is clear that the district court's enjoining of proceedings in state court disrupted the state's enforcement of the same interests underlying its criminal laws and brought this cause within this Court's

holding in *Huffman*, which made *Younger* comity principles equally as applicable to federal judicial interference in civil proceedings which are more akin to criminal prosecution than are most civil cases, as to state criminal proceedings. at 603-605.

I. C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

The instant case falls squarely within this Court's holding in *Trainor v. Hernandez*, ___U.S.___ 97, S.Ct. 1911 (1977). There the state had brought civil proceedings for welfare fraud and attached the recipients' property without notice. *Younger* and *Huffman* principles applied where the state in enforcing its laws took property without notice, absent a showing that state courts were inadequate to resolve the federal due process claims.

Absent a showing that opportunity to contest the validity of the attachment would be unavailable in state proceedings, the Court observed in *Trainor*, *supra*, at 1917 and 1920, that it must not assume due process claims would not be addressed in state court proceedings. In *Sims*, *supra*, 1193, Appellees had statutory remedies for challenging the validity of the taking of their children by a motion to modify which could have been filed at any time prior to the expiration of the temporary emergency order. (Section 17.06). Habeas corpus was available also. These remedies were available in addition to the opportunities which would have been available at a trial on the merits and in subsequent appeal.

The Court below found "the absence of a fair opportunity to present constitutional claims at a meaningful time" to be one of the highly unusual

circumstances justifying immediate federal equitable relief. When viewed in light of this Court's counsel that state appellate courts are often the most appropriate forum for resolving constitutional contentions, *Huffman*, *supra*, at 609, the district court's assertion that no fair opportunity to present constitutional claims at a meaningful time existed is unwarranted. The fact that Appellees were frustrated in initial presentation under these provisions does not show that they could not have resolved their constitutional claims. Thus, here as in *Trainor*, *supra*, at 1920, one cannot fairly conclude that state remedies were inadequate to vindicate federal constitutional claims.

The Court in *Trainor*, *supra*, at 1919, further emphasized the importance of applying *Younger* principles in state enforcement proceedings when it required that the federal district court have some basis for finding a statute violative of express constitutional prohibitions in every clause, sentence, and paragraph. Refusal of the Court to permit the unsubstantiated labelling of a statute as flagrantly and patently violative of constitutional rights necessarily precludes that same characterization of some of the statutory provisions challenged herein. *Sims*, *supra*, at 1192. Since any purported constitutional infirmities of the statutes cannot be shown to infer wanton disregard of constitutional rights, no extraordinary circumstances existed in this case to allow an exception to the rule that federal courts ordinarily will not enjoin state court proceedings.

Analyzing the state's dilemma when its enforcement proceedings are disrupted by federal court proceedings, this Court said such action:

> confronted that state with the choice of engaging in duplicative litigation . . . risking a . . . federal injunction, or of interrupting

> enforcement proceedings . . . *Trainor, supra*, at 1919.

Of course, the State of Texas did not have to risk a federal injunction; it had to live with one. As a result of the federal injunction, the state lost its opportunity to prove that Appellees had abused their children and was prevented from taking any further action to protect the children. Comity principles clearly required that the state, acting in its sovereign capacity to protect its minor citizens, be allowed to go forward with state proceedings in which Appellees could raise their constitutional claims and after which Appellees could appeal to this Court as a matter of right. Federal interference with state court proceedings reflected negatively on the state court's ability to carry out its responsibility to safeguard constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974).

I. D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

A further holding of this Court in the *Younger* line of cases was made in a context similar to that of the instant case and forbade federal court interference with state criminal proceedings filed after the federal complaint but before any substantive proceedings on the merits in the federal court. *Hicks v. Miranda*, 422 U.S. 332 (1975). To hold otherwise, the Court reasoned, would trivialize *Younger* principles. *Hicks, supra*, at 350. In the case now presented, Appellants had filed a second suit in Montgomery County on May 14, 1976, after Judge Singleton advised Appellants at a hearing on May 5 that they could file a proper suit to protect the

Sims children. *Sims, supra*, at 1185. When Appellants filed their second suit they believed that by seeking to protect only Paul Sims and obtaining a writ of attachment to place the boy with his adopted grandparents they were complying with Judge Singleton's earlier counsel. This second proceeding pending in state court before the three-judge court had taken any action on the merits - all earlier action was by Judge Singleton alone - was acknowledged in the court's opinion but was not discussed. The district court seems to have regarded it as unimportant, but *Hicks, supra*, at 349, clearly makes this filing of such a suit call for the application of *Younger* principles in full force.

In *Hicks, ibid.*, the state proceedings were criminal but the Court's decision did not turn on the characterization of the state proceedings. Rather it firmly rested in notions of comity which enable dual sovereigns to perform their overlapping functions with integrity. Vague and conclusory findings of bad faith and harrassment would not be sufficient to call into play one of *Younger's* limited exceptions. *Hicks, supra* at 350. Indeed, the Court admonished, a conclusion of bad faith or harrassment would not necessarily follow had it been shown that the state courts erred on some issues of federal or state law. *Hicks, supra*, at 351. Yet, in the present case the district court found procedural irregularity, confusion, and attendant delay in Appellees' opportunity to present their constitutional claims justified the granting of federal equitable relief even if *Younger* principles applied. *Sims, supra*, at 1188. The district court's finding of extraordinary circumstances which amounted to an exception to the rule that federal courts ordinarily will not interfere with state proceedings contravenes this Court's holding in *Hicks, supra.*

I. E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

There is no federal family law. Domestic relations have traditionally been the bailiwick of state courts. The state courts' management of venue and continuing jurisdiction goes to the core of its administration of justice in child custody cases. Much as "the contempt process . . . vindicates the regular operation of . . . (the state's) judicial system . . .," *Juidice v. Vail*, 430 U.S. 327 (1977), the state's insistence upon parents' presenting their children before the appropriate state forum for presentation of questions of custody is an essential element of its enforcement of statutes and of prior decisions in custody disputes. The availability of a federal forum to parents against whom child custody proceedings are pending in state court impedes the state's effort to shape and enforce coherent policy in this area of substantial public concern. See *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for a discussion of the appropriateness of abstention when problems of public policy are paramount.

Whether child custody battles arise in the context of divorce or when transient troubled families move from place to place leaving suits affecting the parent-child relationship behind them, venue and continuing jurisdiction of subsequent suits presents a complex problem which may affect the resolution of the custody issue on the merits.

Venue for suits affecting the parent-child relationship lies where the child resides. (Section 11.04

of the Code.) Once such a suit is brought, continuing jurisdiction of all subsequent suits affecting the parent-child relationship lies with the Court where the original suit was filed. (Section 11.05 of the Code.) Texas maintains a central file of all such suits and requires that a petition assert that the court in which the suit is filed has continuing jurisdiction or that no court has continuing jurisdiction of the suit being filed. (Sections 11.08 and 11.17 of the Code.) Complex and relatively new statutory provisions govern the transfer of suits affecting the parent-child relationship. Texas' appellate courts are in the process of construing these statutes. See, for example, *Cassidy v. Fuller*, No. B-7369, 21 TEX. SUP. CT. JOURNAL 325 (1978), in which the Texas Supreme Court interpreted Section 11.06 of the Code.

Judge Lowry's transfer of the habeas corpus proceeding and the suit affecting the parent-child relationship, *Sims, supra*, at 1184, from Harris County to Montgomery County was undoubtedly made to establish venue where the children resided and where continuing jurisdiction of subsequent proceedings properly lay. The state court's management of venue and continuing jurisdiction in child custody suits lies at the core of its administration of justice in the area of family law dealing with the custody and possession of children. The federal court should have abstained under *Younger* principles or because substantial issues of state policy were involved, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

II. WHETHER A CASE OR CONTROVERSY EXISTED

The threshold inquiry in a federal court is whether the plaintiff has standing to invoke the court's judicial powers to resolve the dispute and to ask the court to use its remedial powers to right asserted wrongs. Standing

may be viewed as flowing from the requirement that federal courts decide only cases or controversies, United States Constitution, Article III, or from prudential considerations. Case or controversy requirements limit the judiciary to functioning in an adversary context in which opposing parties hone the issues into the sharpest possible focus for examination by the court called upon to resolve the dispute and place the judiciary in its proper role in our tripartite system. *Flast v. Cohen*, 392 U.S. 83, 94, 95 (1968).

Private litigation is almost always justiciable. In the area of constitutional challenges to statutes, the question of justiciability frequently arises and is at issue in the present case. The district court's power to decide the constitutionality of a statute is necessarily dependent upon its power to decide a case properly before it. *Marbury v. Madison*, 1 Cranch 137 (1803). Appellants contend that in several respects the statutes challenged by Appellees were not properly before the court. Appellants further assert that Appellees never showed likelihood of immediate irreparable harm and a lack of adequate remedy at law in order to meet Article III case or controversy requisites with regard to the issuance of equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 502-508 (1974).

II. A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD LITEM, NEVER WERE ASKED TO DO SO, NEVER REFUSED, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT IT APPOINT ONE

There was no jurisdiction in the court below concerning the court's failure to appoint an attorney ad litem for the Sims children. *Sims, supra*, at 1193-1195. Appellants were the wrong defendants against whom to raise this issue. No state legislative appropriation or

statutory provision gives Appellees power to appoint attorneys ad litem for children in suits affecting the parent-child relationship in which the state is a party. (See Section 11.10 of the Code.) Even if there were such authority, questions of conflict of interest could be raised with regard to Appellants' exercise of that authority. It is very unlikely that parents would fail to contest the appointment by the Appellants of attorneys ad litem for their children when the Appellants are seeking to remove custody from those parents. Few litigants would freely confide in an attorney appointed by, or even in the most remote manner beholden to, his opponent in court. Further, Appellants were never asked to appoint an attorney ad litem, never refused to do so, and in fact, Appellants' motion that the three-judge court do so was summarily denied. *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

The judges, who were dismissed as defendants early on in these proceedings, were the only persons who could have applied the alleged unconstitutional provisions in a manner which would have met constitutional requirements. Appointment of an attorney ad litem to protect the interests of a child made subject of suit seeking termination of parental rights is within the discretion of the judge. (See Section 11.10(a) and (c).) *Sims, supra*, at 1194.

Of course, even this discussion ignores the fact that a termination suit was never brought by Appellants against Appellees. The lack of application of or injury by the challenged statute which would have called Section 11.10 into play clearly makes this issue one as to which there is no case or controversy.

II. B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

The three-judge court found the gathering and dissemination of information in the Child Abuse and Neglect Report and Inquiry System (hereinafter referred to as "CANRIS") without prior judicial determination to be violative of due process and the right to privacy. *Sims, supra,* at 1192. The relief decreed is a far-reaching and unwarranted interference with the internal affairs of the state as it investigates child abuse. *Rizzo, supra,* at 371-381. Appellees were never injured by the CANRIS. No allegation that dissemination of information occured was ever made in this case, and none ever occurred.

The CANRIS prevents any dissemination of information stored therein. Not only were Appellants improper defendants as to any alleged infringement of Appellees' privacy rights, but any alleged violation of due process or privacy rights also resulted in no injury to Appellees. The facts alleged support no "actual causal relationship" between the challenged statute or practices under it and Appellees' alleged injury. Appellees rely upon some remote possibility of injury and thus failed to establish their standing to challenge the CANRIS. *Warth v. Seldin,* 422 U.S. 490, 502-508 (1975).

II. C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

The statutory provision for preponderance of the evidence as the standard of proof in suits affecting the parent-child relationship was never applied to Appellees. Since no proceeding in state court moved forward to allow the standard to be used in this case, Appellees were not injured by it even in the pending Chapter 14 suits. Additionally, no change in policy or increased diligence on Appellants' part could have affected the remedy decreed by the district court. The

fact of injury caused by the challenged standard could not be demonstrated outside of judicial proceedings. The mere characterization of Appellees' right to family integrity as fundamental cannot be the basis for concluding that preponderance of the evidence as the standard of proof does not meet due process requirements. In that respect, the district court's finding of a justiciable dispute between Appellants and Appellees rests on conjecture that injury would surely result if the standard were applied.

Any purported threat of immediate irreparable injury with regard to the standard of proof used in termination proceedings was remote indeed. See *O'Shea, supra,* at 502-508. The district court based its finding of standing to challenge Chapter 15 of the Code on the spectre of the future filing of a suit seeking termination of parental rights. *Sims, supra,* at 1190. The spectre is not a frightening one for several reasons. The only evidence supporting the existence of this apparition was caseworker Rex Downing's statement in a deposition that "he would seek termination as a part of the Montgomery County proceeding." *Sims, id.* It is not clear what Mr. Downing meant. Did he mean "I would if I could"? Or did he mean "I will"? The district court did not allow live testimony to clarify this ambiguous statement on which it placed great reliance. Further, Mr. Downing had no authority to file a termination suit. He was required to confer with supervisory staff and to obtain a consensus as to the appropriateness of the filing of a petition seeking termination. In any case, Mr. Downing was obviously unable to carry out the purported threat; because the referred to suit in Montgomery County, *Sims, id.*, had already been filed when the federal district court enjoined all attempts to enforce the challenged state laws against Appellees and the suit sought custody, not termination. Finally, and most importantly, Mr. Downing was the lone alleged

threatener and he was not joined as a defendant in these proceedings in federal court. *Rizzo, supra,* at 371-373 (1976).

Parties joined in their official capacity and individually were not shown to have threatened Appellees with filing a termination suit sometime in the future, thus Appellees had no proper defendant against whom they could raise the issue of threat of immediate irreparable injury under Chapter 15. *Rizzo, id.* Causation must be shown in actions brought under Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. the Civil Rights Act of 1871, 42 U.S.C. §1983. Liability under respondeat superior theory will not be imposed on government officials because the agency for which they work employs a tortfeasor. The accused official must be shown to have implemented or executed a policy or statute which violated the complainants' constitutional rights unless governmental custom is shown to have injured the complainants. *Monell v. Department of Social Services of the City of New York,* ___U.S.___, 46 L.W. 4569 (June 6, 1978); *Rizzo, supra,* at 376-377.

II. D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' A TIMELY HEARING

Appellants never refused Appellees a timely hearing. The state court's docket is controlled by the judge or his designee. Since the judges were dismissed from these proceedings at an early stage, Appellees were left with no proper party against whom to assert their due process claims concerning injuries caused by departure from the statute's mandate that a hearing be held at the expiration of the ten-day order to determine whether the children should be returned to Appellees or whether a suit affecting the parent-child relationship should be filed.

Failure of Appellees to obtain the filing of or a hearing on their motion to modify was in no way caused by Appellants' conduct. *Sims, supra,* at 1184. Appellants did not interfere with the filing of the motion. Appellees might have been able to state a claim against the clerk of the court or the judge but neither of them was a party to this suit when it was decided on the merits. *Rizzo, supra,* at 377. Equitable relief was granted against Appellants without adequate showing of responsibility or causal connection between Appellants' conduct and the injury alleged.

II. E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

No lively controversy existed between Appellants and Appellees with regard to the possession of the children at the time of the hearing on the merits in this federal proceeding and none exists for appellate review. *Roe v. Wade,* 410 U.S. 113, 125 (1973) (citations omitted). Judge Singleton had ordered the children returned to Appellees. Appellants had complied with that order. The children were in the custody of their parents and the issue of custody was not litigated in these or any other proceedings.

In the contest based on the writ of attachment issued in the second suit pending in Montgomery County, questions relating to the possession of Paul Sims were not ripe for judicial determination since Appellees had not been served with citation and attachment had not been levied. Any threat concerning the possible levying of attachment was not an injury for judicial determination. Even if attachment had been carried out and Paul Sims had been temporarily placed with his grandparents, it is not clear what effect his placement would have had upon Appellees' access to him.

enjoyment of his companionship, and the parent-child relationship between Appellees and the boy. The court never learned the proximity of grandparents and Appellees living quarters, the status of their relationship, or any other relevant fact about the possible effect of levying of the attachment.

Because Appellees had present custody of their children, issues relating to the timeliness of hearings after removal, notice, and other aspects of removal procedure had become either moot or conjectural and thereby inappropriate for judicial resolution. Judge Singleton's returning the children under an ex parte order prior to any adversary hearing in federal court had a mooting effect on the issues revolving around possession of the children. The three-judge court's enjoining of state proceedings removed the issue from the case on the merits and had the effect of permanently resolving the issue. *Warth, supra*, at 516.

II. F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

The right to contract, which is one subject of the Civil Rights Act of 1871, 42 U.S.C. §1981, was never raised as a real issue in this case and therefore jurisdiction under it does not lie upon these facts. Appellees stated no cause of action under the general federal question statute, 28 U.S.C. §1331. Jurisdiction is not conferred by the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; these sections merely create a remedy. *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, *cert. denied* 405 U.S. 996 (1972). Section 1983 of the Civil Rights Act of 1871 and its companion jurisdictional statute, Section 1343 of Title 28, are the only possible basis of jurisdiction as to which a cause of action could have been alleged. However, under these statutes a

federal plaintiff must have a defendant who actually violated plaintiff's constitutional rights. Respondeat superior theories of vicarious responsibility are impermissible under these statutes which are intended to enforce the 14th Amendment. *Rizzo, supra*, 376-377; *Monell v. Department of Social Services of the City of New York, supra*. In any case a proper defendant must be shown to have authority and capacity to perform the function desired as relief.

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

The district court found that the use of the Child Abuse and Neglect Reporting and Inquiry System (CANRIS, Section 34.06 of the Code) for collecting and storing information gathered by the state in its legitimate investigation of reports of child abuse is violative of the right of privacy and due process guarantees absent a judicial determination of abuse or neglect. *Sims, supra*, at 1192. The court said that the state may maintain investigatory files, but it found CANRIS exceeds permissible investigatory purposes.

Both the court and the state agree that the purpose of investigating reports of child abuse is to protect children who are in danger. That the state has a legitimate interest in protecting children from abuse and neglect is not contested. Maintaining files

containing information discovered during investigation assists the state in determining whether protection is needed and if so, what kind. Investigating reports of child abuse necessarily affects the privacy of the family to some degree. The right to family integrity and the right to preservation of the zone of privacy which surrounds the family are of great importance but they, like other constitutionally protected rights, are not absolute. Rather, they are subject to reasonable regulation in furtherance of a legitimate state interest. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 168, 169 (1944). Pursuant to its legitimate interests the state can make and enforce reasonable laws which do not violate due process. *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973 (*aff'd*, 414 U.S. 1139)(1974); *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972).

The district court in effect found the state's statutes designed to effectuate its legitimate interest in protecting children were unreasonable; that is, they violated the right to privacy and due process guarantees.

Appellants asserted above that the right to privacy is not absolute but the question of the nature of that right remains to be established. In *Paul v. Davis*, 424 U.S. 693, 713 (1976), this Court said that the right to privacy concerns the areas of "marriage, procreation, contraception and childrearing and education." These areas are essentially personal and are the places in which individuals may be best able to exercise discretion, but even this list above contains an area which for most of us is largely controlled by the state. The state's interest in education is often superior to that of parents'. Most of us are intimately acquainted with compulsory school attendance laws.

The district court quoted *Davis, supra*, at 713 in its

opinion. *Sims, supra*, at 1192. The inclusion of "education" in the list makes it clear that even if education is an area in which the choice and discretion characteristic of privacy rights may be available when there are alternatives to public education and it may be surrounded by zones of privacy, it is also an area in in which governmental intrusion or participation is strikingly present. From this observation we may infer that right to privacy not only can be infringed by laws made in accord with the state's legitimate interest but that it regularly is. *Traver v. Smith*, 78 Wash.2d 152, 470 P.2d 172 (1970), *cert. denied*, 402 U.S. 1000 (1971). How due process fits in where education is concerned is unclear because few people are afforded any judicial determination before they are thrown into school; perhaps even being labelled "truant" or a "C student" or something else like "class favorite."

Clearly this court was prudent in finding that injury to reputation did not require due process procedures. *Davis, supra*, at 701-710. When a change in legal status, an adverse effect on property or liberty rights, or a reaching of the very rights implicit in our concept of ordered liberty is combined with injury to reputation, *Davis* at 705 discussing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), procedural safeguards are necessary. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the posting of Constantineau's name as that of a problem drinker resulted in Constantineau's loss of freedom to purchase alcoholic beverages. Reputation alone, the Court held in *Davis* is not a liberty or property interest protected by the Due Process Clause. *Davis* at 712.

Logically, whether reputation is besmirched as it relates to family responsibilities, marital obligations, honesty, or drug abuse, the significance of resulting injury can best be measured for purposes of providing an adequate remedy by assessing the amount of damage

caused. Loss of employment, inability to attract new business, loss of freedom of choice in purchasing goods or in entering public places and similar consequences would indicate injury which would likely be amenable to judicial resolution. In the present case there was no damage to reputation because no dissimination of information took place. Without dissemination labelling is harmless. Injury to reputation requires a public response to the label applied. Being labelled a "perpetrator" injures no one if the appellation is not circulated.

Nevertheless, the district court found:

> The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis.*

Sims, id. Why the injury to Appellees was "far greater" than to the damage to Davis' reputation is not explained. Perhaps there is a hierarchy of epithets or perhaps the undisseminated accusation of injuring a child is worse than being publicly called a thief.

The CANRIS prohibits dissemination of information stored therein. Access to CANRIS information is unavailable even to workers investigating reports of child abuse. An investigating worker may only ask the CANRIS whether there have been previous reports of child abuse or neglect. Though the court said that dissemination by the CANRIS of information was impermissible, there never was any allegation at any point in these proceedings that dissemination occurred, and in fact none did occur.

Any other analysis of when due process is required creates a problem of placing monetary value on the right to privacy in some extraordinary way or of finding the very act of storing investigative information in the

CANRIS mysteriously injurious. Appellants are employees or officials of a statewide agency. CANRIS is in reality a statewide investigative file. If it is constitutionally permissible to maintain child abuse investigative files, it seems unreasonable to allow a parent to be subject to the gathering and collecting of information if he stays in one place but free of the information's effect if he moves about. Law which had that effect would encourage the very behaviors which are dangerous to children by prohibiting use of information about abusive conduct which the investigating worker did not learn on his own. If investigatory files may be maintained by the state, it is difficult to comprehend what is intrinsically more dangerous or offensive to privacy and due process rights about putting reports in a computer than in a file folder. In addition to the obvious utility of the CANRIS, no injury to Appellees resulted from the use of this limited but large investigative file.

If the state should decide to seek a change in the legal status of a parent believed to be endangering his child, judicial proceedings will be instituted with attendant due process protections. Up to that time nothing will have happened under section 34.06 to affect a parent's liberty or property interest or even his reputation interest. What will have happened to this point is an investigation will have been made.

Section 34.06 also provides for sharing information. Such sharing is anonymous. Names of persons are not provided by the CANRIS.

In discussing the limitations on personal rights of privacy this Court observed:

> [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of

> potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right to privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973). If the state has a compelling interest in protecting the health of an unborn child in the third trimester of his mother's pregnancy so as to infringe upon the parent's personal right of privacy which earlier in her pregnancy permitted her to choose an abortion, it follows that the state's interest in protecting the health of a living battered child is at least equally compelling. The fact that all 50 states currently provide for mandatory reporting of incidents of child abuse and neglect convincingly demonstrates the compelling nature of the state's interest in protecting children. [See Shepard, "The Abused Child and the Law," The Rights of Children, 174, 182-83 (1973).]

A parent's right of privacy as to the family relationship is not the primary right being protected by the CANRIS. Since a parent has no right to injure his child, it would be unreasonable to permit him to harm his child and then claim a right of privacy in order to bar interference because the matter relates to the family relationship.

Quite the contrary, if the child is being physically or emotionally injured by his parent, the state has both right and obligation to intercede to protect the child. Indeed, to protect individual rights of a parent because of the family relationship at the expense of the corresponding and sometimes competing individual rights of the child is to give the parent greater individual and privacy rights because he is a family member, while commensureately diminishing the individual and privacy rights of the child because he is a member of the same family.

III. B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

The district court exceeded the bounds of established due process standards when it required that every Texas court must hold its hearing on an emergency petition seeking ratification of an extrajudicial taking of a child not beyond the very day of the seizure.

The leading, and indeed controlling case on this point is *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff. on appeal*, 414 U.S. 1139 (1974) without an opinion. In *Newton*, the plaintiffs claimed "that a parent had an immediate right to a hearing. . . ." and that a statute which allowed a five to seven day period to intervene between the state's assumption of custody of a child and the hearing was "unconstitutional in that it deprived the plaintiffs of custody without a hearing. . . ." *Newton*, at 785. The *Newton* court rejected the contention of the plaintiffs there and upheld the constitutionality of the challenged North Carolina statute. Appellees in the *Sims* case eventually abandoned an initially asserted comparable contention. The *Sims* court upheld a ten-day period from seizure of a child by the state until a full adversary hearing was held. Neither Appellants nor Appellees challenge this holding. The emergency action authorized by Section 17.01 of the Texas Family Code is explicitly approved in *Sims* at 1192. However, disagreement exists over the procedure to be followed in filing a petition and obtaining an ex parte order following an emergency removal of a child.

What remains at issue in this aspect of the appeal of the *Sims* decision is the timing of the ex parte presentation to a court of the request for judicial sanction of an extrajudicial taking of a child. The

Newton court did not require any more than such ex parte approval. The *Sims* court has required "the State to make all reasonable efforts to serve upon them [the parents] notice of this initial presentation to the court." At 1193. Appellants do not contest this additional requirement. They only argue it is impermissible to require that this emergency ex parte hearing (i.e., the initial presentation to a judicial authority) be held *not* "beyond the very day of seizure." *Sims* at 1193. Such a conclusion not only is not required by the dictates of the concept of flexible due process principles for "extraordinary situations" stemming from the cases analyzed in *Newton* at 786-787, but also is inconsistent with the tenor of the guidelines set out in those and other "extraordinary situation" cases. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); as well as, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); and *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961). Indeed, the *Newton* court implicitly approved the North Carolina State court judge's clear refusal to afford the plaintiffs therein a hearing either at eighteen hours or at three days after the State had assumed custody of their child. At 787 and 784.

The relief Appellees plead for here is so limited as to belie its importance. They ask that the representatives of the governmental agency charged with protecting the children of Texas be allowed a reasonable time (i.e., not the "very day") to seek judicial approval for the assumption of emergency custody of children whose health or safety is endangered. If such relief is not granted, the Texas Department of Human Resources will be compelled by the *Sims* decision to return such children to conditions threatening their health and physical safety for no reason other than the inability to secure judicial sanction of an emergency seizure on the "very day" it occurs.

III. C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

The three-judge district court held that an attorney ad litem must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. Appellants contest this ruling only insofar as the court included in its decision a requirement for representation at the ex parte hearing required in a Chapter 17 emergency proceeding. An examination of applicable constitutional standards will demonstrate that appointment of an attorney ad litem for this same day hearing is not necessary to fulfill due process requirements.

It is clear that due process standards are not static; they must be determined with regard to the time, place, and circumstances involved in the fact situation under consideration. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961). Appellants do not contest the district court's conclusion that an attorney ad litem should be appointed to represent the child in every suit affecting parent-child relationships which could be determinative of the child's status. The immediate ex parte hearing, however, can never settle any rights of any party; it is held merely to determine whether an emergency situation exists. If the court decides that the child is in need of emergency protection, a full adversary hearing, including an attorney ad litem appointed to represent the child, will be held within ten days of the Department's taking custody of the child. It is only at this second hearing that the legal relationship between a parent and child can be altered. Appointment of an attorney ad litem for the initial hearing to determine whether there is an emergency is not necessary to meet the fundamental fairness standard

for due process in juvenile proceedings. *In Re Burrus*, 403 U.S. 528 (1971). This fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than ten days from the actual seizure of the child.

An additional consideration is the undue burden such a requirement creates. If an attorney ad litem for the child were necessary for the initial hearing, an attorney would not only have to be found on short notice but would have to be paid for both the emergency ex parte hearing, as well as for the full adversary hearing. The practical implications are overwhelming, especially in the large rural areas of the state, particularly when weighed against the short-term impact of the ex parte emergency hearing.

Finally, the ruling of the district court fails to take into consideration the existing procedures used by Texas district courts handling Title 2 matters. Some urban counties, for example, have permanent full-time guardians ad litem available to represent the interests of children, pursuant to Section 11.10 of the Texas Family Code. The decision by the three-judge court fails to make it clear whether the presence of a guardian ad litem is sufficient to fulfill due process standards, or whether both a guardian and an attorney ad litem must be present.

III. D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

The district court held that "[w]hile such a suit [affecting the parent-child relationship] is not akin to a delinquency proceeding requiring proof beyond a

reasonable doubt . . . the fundamental right to family integrity requires at the very least that the State . . . prove its case by clear and convincing evidence." *Sims* at 1194. This requirement that suits instituted for the protection of children be determined by a standard higher than preponderance of the evidence reaches far beyond the scope of due process requirements.

First, the three-judge court cited the district court opinion in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975) for the proposition that the right to family integrity deserves a standard of clear and convincing evidence. In its appellate review of *Alsager*, the Eighth Circuit expressly declined to rule on the appropriate standard of proof at a parental termination hearing in order to leave open future consideration of the issue:

> Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future.

Alsager v. District Court of Polk County, 545 F.2d 1137, 1138 (8th Cir. - 1976). Thus, neither the Eighth Circuit nor this Court has ruled on the appropriate standard of proof in a suit affecting the parent-child relationship. That the appropriate standard is "preponderance of the evidence" rather than "clear and convincing evidence" is elaborated on in the discussion below.

Second, the three-judge court's sweeping and facile assertion that because a right is a fundamental right it mandates a clear and convincing standard of evidence is not supported by careful or persuasive analysis and is premature, especially in the area of child abuse and neglect which is developing rapidly and involves

innumerable factors which are not readily quantifiable. *Tippett v. State of Maryland*, 436 F.2d 1153, 1159 (4th Cir. 1971), *cert. dismissed as improvidently granted, under the name of Murel v. Baltimore City Criminal Court*, 407 U.S. 335 (1973), and *Powers v. State*, 556 S.W.2d 567 (Tex. 1976), held that involuntary mental commitment for an indefinite period of time requires the State to prove its case by a preponderance of the evidence rather than by clear and convincing evidence. The *Tippet* court pointed out that the present state of knowledge concerning mental illness is indefinite enough so that the "choice of the standard of the proof should be left to the state." *Tippett* at 1159. The same is true for situations where a child's physical and mental well-being is at stake. Indeed, the issue of mental and emotional illness in children and its relation to family pathology is an analogous and equally unresolved area of knowledge. Any fundamental right to family integrity cannot be considered "more fundamental" than a potential mental patient's fundamental right to liberty. Because of the difficulty in obtaining the facts constituting child abuse or neglect, the traditional standard of proof, one with which courts and juries are more familiar, should apply.

Third, as discussed in the examination of the CANRIS system, in Question III above, a parent's right to rear his child as he sees fit is not the only important right to be weighed, the child's right to protection from abuse and neglect is of at least equal importance. Additionally, workers who investigate child abuse cases are not trained in the gathering of evidence as are law enforcement officers. By demanding a standard of clear and convincing evidence, this right to protection is seriously jeopardized, since by social custom as well as statutory and constitutional law family life is already shielded from public view and precipitous intervention.

Finally, an application of the clear and convincing evidence standard in suits affecting the parent-child relationship where conservatorship or termination is sought would be an unwarranted intrusion into state evidentiary law. In Texas, where litigating parties have a right to have fact issues in equity as well as at law tried before a jury, "clear and convincing evidence" is a judicial standard of factual sufficiency and may not be submitted to the jury. *Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975); *Omohundro v. Matthews*, 341 S.W.2d 401, 410-411 (Tex. 1960); *McCormick's Handbook of the Law of Evidence*, 2nd Edition (1972) p. 797, fn. 73. Thus, requirement of this higher standard would not only alter the Texas evidentiary system radically, it would also constitute a violation of the comity principles enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) and its civil progeny. Additionally, it would likely be ineffective in protecting parental rights since the standard is difficult for lay-persons to grasp and perhaps also be excessive in protecting parental rights by discouraging suits against abusive parents because adequate evidence could rarely be amassed.

Moreover, by its very consideration of the standard of proof issue, the district court acted beyond the scope of its powers as set out by Article III of the United States Constitution. By the terms of this Article, the judicial authority of federal courts is limited to cases or controversies. U.S. CONST. ART. III, § 2, *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974). In order to establish a case or controversy, a plaintiff must allege direct injury or threat of direct injury to himself. *O'Shea* at 494. If the issue argued by the plaintiff is merely hypothetical, its consideration is outside the scope of the power of the federal judiciary since any ruling would constitute a mere advisory opinion. *Hall v. Beals*, 396 U.S. 45, 48 (1969).

The district court reached the issue of standard of proof in suits affecting the parent-child relationship by stating that even though no such suit had been brought with regard to the Sims children, "the spectre of a Chapter 15 ["Termination of the Parent-Child Relationship"] suit involving the Sims family is sufficient to confer standing." *Sims*, at 1190. The court incorrectly stated in its opinion that a Chapter 15 action had been filed on May 14, 1976; no such action was *ever* filed in this suit. The court brought the issue of standard of proof into question by reasoning that since a Chapter 15 suit *could* eventually be brought by the Texas Department of Human Resources with regard to Paul Sims, this possibility conferred on the three-judge court the jurisdiction to consider the constitutionality of the standard of proof which would be used in such a suit. This attempt to bring the standard of proof issue within the Article III grant of judicial authority falls short of constitutional standards for several reasons.

First, the district court justified its consideration of the standard of proof question by stating that "This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent." *Sims, id.* Since Appellants repeatedly objected to the court's consideration of Family Code provisions not actually involved in the factual dispute, it is clear that Appellants never agreed that the challenged provisions were interdependent. (Transcript of Proceedings, October 26, 1976, pp. 36, 153-55, and 182). Thus, the three-judge court's examination of the standard of proof in suits affecting the parent-child relationship was not done by agreement of the parties.

Second, the criteria for a case or controversy set out in the two cases the district court employs to justify its consideration of the standard of proof, *O'Shea v. Littleton*, 414 U.S. 488 (1974) and *Massachusetts v.*

Mellon, 262 U.S. 447 (1923) are not met by the facts in this case. The language of *O'Shea* and *Mellon* expressly state "[a]bstract injury is not enough," *O'Shea* at 494, and the plaintiff must allege that he "has sustained or is immediately in danger of sustaining some direct injury," *Mellon* at 488. The Simses did not face the requisite direct injury by the challenged standard of proof provision. In the first place, no termination suit where the "preponderance of the evidence" standard would have been used had even been brought against the Simses. They had never been subjected to the challenged statute and therefore suffered no injury. In the second place, the only possible threat of imposition of the challenged standard came from the caseworker Rex Downing's statement that he would probably recommend that termination of the parent-child relationship be sought. This alleged "threat" fails to meet the "immediate danger of direct injury" criterion set out in *Mellon*, since a single caseworker does not have the authority to make the decision to institute a termination proceeding. Under Texas Department of Human Resources regulations, when a child is to be removed from his home the decision as to whether court action will include a request for termination must be concurred in by the supervisor, as well as the caseworker. Thus, Mr. Downing's statement that he would recommend that termination be sought falls far short of proving that the Sims suffered even the requisite threat of injury, much less any direct injury.

Finally, even if the Simses had faced direct injury from a termination proceeding, the allegations regarding the standard of proof fail to meet the "case or controversy" standard since the child in question was returned to his parents before the trial on the merits. In order to be a case or controversy, the actual controversy must exist at the time of appellate review and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 123-129 (1973). Thus, since there is presently no

reasonable expectation that Paul Sims will be the subject of a suit affecting the parent-child relationship which would use the challenged standard of proof, the issue fails to meet the case or controversy standard for lack of ripeness, and the three-judge court ruled on this issue outside the scope of its constitutional power.

CONCLUSION

The three-judge court should have abstained. There was no jurisdiction as to many of the constitutional issues raised. The case was decided wrongly as shown above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Jurisdictional Statement have on this the 30th day of June, 1978 been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

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FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * 78-6

NO. _____

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

VOLUME I

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

On Appeal From The United States District Court For The Southern District Of Texas Houston Division

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APPENDIX A

MEMORANDUM OPINION OF THREE-JUDGE UNITED STATES DISTRICT COURT DATED: OCTOBER 12, 1977

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTHOUSE

HOUSTON, TEXAS 77002

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Mesdames and Gentlemen:

In re: C. A. 76-H-665
John Pleasant Sims, et al.
v. State Department of
Public Welfare, et al.

The court directs counsel for plaintiffs to prepare an appropriate final judgment consistent with the conclusions of this court as reflected in the attached memorandum opinion and to submit such judgment to the attorney general for approval as to form.

Very truly yours,

s/s
John V. Singleton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	)(	
Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-665
STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS, ET AL.,	)(	
Defendants.	)(	
DOROTHY MAE WOODS, ET AL.,	)(	
Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-1120
RAUL JIMENEZ, ET AL.,	)(	
Defendants.	)(	

Before INGRAHAM, Circuit Judge, and
SINGLETON and STERLING, District Judges.
SINGLETON, District Judge:

This civil action is challenge to the constitutionality of portions of Chapters 11, 14, 15, 17, and 34, Title 2, TEXAS FAMILY CODE, seeking declaratory, injunctivonetary relief. The plaintiffs in the *Sims* case are two adult parents and their three minor children who seek relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare. Additionally, the case of *Woods v. Jimenez*,

Civil Action No. 76-H-1120, pending in this district, was consolidated with the *Sims* case solely on the issue of the right of indigent parents to counsel in suits for the termination of the parent-child relationship.

Pursuant to 28 U.S.C. §§ 2281, 2284, a three-judge district court was convened to determine the constitutional issues. The court has carefully considered the extensive briefs, the arguments of counsel, and the evidence presented and concludes that the case is properly before the court for determination, that certain portions of the Texas Family Code are violative of minimal constitutional standards, and that appropriate declaratory and injunctive relief is necessary.

The threshold issue is that of abstention in light of *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, ___ U.S. ___, 51 L.Ed.2d 376 (1977), and *Trainor v. Hernandez*, ___ U.S. ___, 52 L.Ed.2d 486 (1977). Having viewed the instant case with an eye to the notions of comity and federalism which underlie *Younger's* policy of equitable restraint, this court concludes that abstention is not warranted and would be improper under the unique and compelling circumstances of this case.

A chronology of the events which precipitated the filing of this suit is necessary. In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas. On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. In response to that call, caseworker Rex Downing visited the school and, on the same date, took possession of the three Sims children

pursuant to Section 17.01 of Title 2 of the TEXAS FAMILY CODE.[1] The next day, March 26, the Child Welfare Unit instituted a "Suit for the Protection of a Child in an Emergency" pursuant to Chapter 17, which was filed in Juvenile Court Number One of Harris County, Texas, Cause No. 38,295, and concerned all three of the Sims children. Also on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court issued an ex parte order pursuant to Section 17.04, which has the effect of removing the children from the custody of their parents. Section 17.05 provides that such an order is of ten days in duration, and, upon the expiration of the order, the court is required to either order the restoration of the children to their parents or direct that a "Suit Affecting the Parent-Child Relationship" be filed.

On March 31, 1976, the plaintiff-parents sought to present to Judge Lowry a motion for modification of the March 26 Order, pursuant to Section 17.06. Although that section requires that a hearing be held on the motion, no hearing was in fact held. Rather, evidence before this court on May 5, 1976, indicates that the motion was not presented to Judge Lowry because of his temporary absence and was returned to counsel for the parents. Later on March 31, 1976, counsel for the parents filed with the Juvenile Court Number One, a petition for a writ of habeas corpus, Cause No. 1,069,341.

On April 5, 1976, a hearing was held before Judge Lowry on the parents' petition for a writ of habeas corpus. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. However, the merits of the dispute were never addressed. At the April 5 hearing, Judge Lowry determined that the children were residents of Montgomery County and, despite their

custody in Harris County, transferred the matter to Montgomery County. Later on April 5, at Judge Lowry's direction pursuant to Section 17.05(B) (2), the Harris County Child Welfare Unit filed a "Suit Affecting the Parent-Child Relationship" in *Harris* County. This second petition by the current defendants was filed in the same Cause No. 38,295 as the original emergency suit filed under Chapter 17. Finally, on April 5, 1976, Judge Lowry issued another ex parte temporary order pursuant to Section 11.11.[2] The order directed that the children continue in the possession of the Harris County Child Welfare Unit and purported to set a hearing upon its expiration. However, the order setting the hearing was entered in blank and to date the blanks have never been completed.

On April 6, 1976, the "Suit Affecting the Parent-Child Relationship" (Cause No. 38,295), which supplanted the emergency suit, and the habeas corpus action (Cause No. 1,069,341) were officially transferred to the District Court of Montgomery County and assigned to the docket of Judge Ernest A Coker, Sr. The transfer was apparently made *sua sponte* under Section 11.06(a) despite the requirement that it be transferred upon a timely motion.[3] It is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County. During the entire time, the children remained in the custody of the Harris County Child Welfare Unit.

On April 19, 1976, the plaintiffs filed their Original Complaint in federal court. On May 4, 1976, the plaintiffs filed a motion for leave to file an original petition for a writ of habeas corpus with the Texas Court

of Civil Appeals for the 14th District, which was denied on the same date. The next day, the managing judge of the three-judge district court conducted an evidentiary hearing at which the court found that the children were not in the legal custody of the defendants because the ex parte temporary order under Chapter 17, dated March 26, and the ex parte order under Section 11.11, dated April 5, had both expired. The court ordered that the Sims children be returned to their parents, but did not enjoin the Department of Public Welfare from taking action under state law to properly establish a temporary conservatorship over the children. Therefore, on May 14, 1976, the Department of Public Welfare filed another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County. This action concerned Paul Sims only.

The Juvenile Court on May 14, 1976, established a temporary managing conservatorship for the child and set a hearing for May 21. On May 21, upon the motion of the plaintiffs, the managing judge of the three-judge panel temporarily enjoined the hearing in Montgomery County. Subsequently, after a hearing, the three-judge court extended the restraining order and enjoined any further state proceeding under the challenged statutes pending determination of the plaintiffs' constitutional challenges.

I. ABSTENTION ISSUE

As a preliminary matter, the parties are in dispute as to whether there is a pending state action. Although the Chapter 15 action filed on May 14, 1976, was obviously not pending on the date the federal action was instituted, the original "Suit Affecting the Parent-Child Relationship" which was filed on April 5, 1976, and transferred to Montgomery County from Harris County on April 6 was pending on April 19 and, along with the action filed on May 14, remains on the docket of the

District Court of Montgomery County. The plaintiffs' argument that there is no pending proceeding because the temporary orders have expired is therefore without merit. *See Steffel v. Thompson*, 415 U.S. 452 (1974); *Hicks v. Miranda*, 442 U.S. 332 (1975). Although, as we note *infra*, there is no pending state judicial proceeding with regard to some aspects of the plaintiffs complaint, abstention must still be addressed because of the proceeding filed on April 5, 1976.

The extent to which *Younger* principles apply to a case where the pending state action is civil in nature is still unclear. The first acknowledged extension of *Younger* to civil cases involved a nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, LTD., supra* at 604. However, more recently, in *Juidice v. Vail*, ___U.S.___, 51 L.Ed.2d 376 (1977), and in *Trainor v. Hernandez*, ___U.S.___, 52 L.Ed.2d 486 (1977), the Supreme Court extended the coverage of *Younger* to an even broader range of civil cases. In each of the two most recent decisions, the court has reserved the issue of whether *Younger* principles apply to all civil cases. We believe that the facts of the instant case do not require abstention and, moreover, the nature of the constitutional challenge lodged against the questioned statutory scheme presents a compelling reason for this court to serve as the "primary and powerful" source for vindication of federally protected constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).

In *Huffman* the Court emphasized that the fact that the state's criminal process was not involved was not determinative. Rather, a federal court considering an injunction against a pending state proceeding must carefully weigh the notions of comity and federalism and allow the state to effectuate its own policies through "a forum competent to vindicate any constitutional

objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. at 604 (1975). The plaintiff in *Huffman* sought an injunction against the execution of a judgment entered in a pending nuisance action brought by the State of Ohio. Because such a federal injunction would disrupt "that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws," abstention was required. 420 U.S. at 605. The Court, therefore, extended the *Younger* policies of nonintervention to civil cases where the Court could find that a federal injunction would be "an offense to the State's interest... every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. It was at this early stage of the evolution of *Younger* to civil cases, that this court issued its preliminary injunction on June 18, 1976.

Since *Huffman*, this court has received the Supreme Court's guidance in *Juidice* and in *Trainor*, both expanding the original narrow application to civil cases in a manner requiring this court to carefully reflect on its judicial responsibilities with respect to the vindication of these plaintiffs' constitutional rights.

In *Judice v. Vail, supra*, *Younger* principles were held to prevent a federal court from enjoining a state judicial contempt proceeding on the basis of the weight to be given "a State's interest in contempt proceeding, through which it vindicates the regular operation of its judicial system." ___ U.S. at ___, 51 L.Ed.2d at 384. Acknowledging that such an interest is perhaps "not quite as important as is the State's interest in the enforcement of its criminal laws, ... or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*," the Court labeled the interest in contempt proceedings as "of sufficiently great import." ___ U.S. at ___ 51 L.Ed.2d at 384. In

finding that "the contempt power lies at the core of the administration of a State's judicial system," ___ U.S. at ___, 51 L.Ed.2d at 384, the Court continued to concern itself with a pending state action which, like a criminal prosecution or nuisance proceeding, was unique to the governmental role of a state.

In *Trainor v. Hernandez, supra*, the Court appears to have expanded the types of state civil proceedings requiring the application of *Younger* principles. In *Trainor* the State of Illinois brought a civil action against the appellees seeking a return of welfare payments alleged to have been wrongfully received and sought a writ of attachment. The three-judge court enjoined the attachment and declared the Illinois Attachment Act to be unconstitutional. In remanding to the lower court for consideration of whether the attachment statute provides a debtor with a proper forum for his constitutional challenge, the Supreme Court noted that the principles of *Younger* and *Huffman* apply to injunctions against actions "brought by the State in its sovereign capacity," ___ U.S., ___, 52 L.Ed.2d at 496, rejecting the argument that attchement was not a remedy unique to the state and emphasizing, instead, that the state was a party to the attachment in its underlying role of administering public assistance programs. The Court concluded that a federal injunction's "disruption of suits by the State in its sovereign capacity, when combined with a negative reflection on the State's ability to adjudicate federal claims" dictated abstention unless "extraordinary circumstances were present." ___ U.S. at ___, 52 L.Ed.2d at 497.

It is in this legal and factual setting that this court decides that *Younger* and its progeny do not require application of their principles to the current dispute between these plaintiffs and the State of Texas.

Although *Juidice* and *Trainor* have expanded the types of civil cases to which *Younger* extends, it is clear that neither decision purports to apply *Younger* principles to all civil litigation between a state and its citizens. *Juidice*, ___U.S. at___, 51 L.Ed.2d 385 n. 13 (1977); *Trainor*, ___U.S. at ___, 52 L.Ed.2d at 496 n.8 (1977). From this we conclude that because of the wide range of interests and circumstances that could conceivably be present in a civil dispute, the proper role of a federal court is to carefully analyze each dispute individually with an equitable view toward the principles of comity and federalism and a careful study of the state action involved.[4] This court considers the *Younger* principles inapplicable here for two reasons: the nature of the state action and the nature of the plaintiff's challenge.

First, the action taken by the State of Texas against the plaintiffs is multifaceted. Unlike a criminal prosecution, or a nuisance, contempt, or attachment proceeding, there is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds. Many of the challenged actions taken by the state do not and will not involve any judicial proceeding.[5] Certainly as to these, there is no pending state civil litigation about which even to consider abstention. The only pending state suit is the one pending in Montgomery County, filed on April 5, 1976. Because the dispute between the plaintiffs and the State of Texas concerns more than a single state judicial action to which plaintiffs could raise a constitutional defense, *Younger* principles are inapplicable. *See Younger*, 401 U.S. at 46 (1971). The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This court will not consider part of the scheme and abstain from another part. To do so would seriously jeopardize any hope for an

effective statutory scheme and, in the name of comity and federalism, do violence to the state functions those principles seek to protect.

As a second independent basis for the inapplicability of *Younger* principles, we note that the plaintiffs' constitutional challenge is directed primiarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, adstention would be inappropriate. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975). The denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger*. *Cf. Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974).

Even if the nature of the state action and the constitutional challenge were such as to require the application of *Younger* principles, it is clear that there exists here circumstances where, even though the principles are otherwise applicable, a federal court should not abstain. Certainly, the threatened injury to the plaintiffs is both great and immediate. As we note *infra* the constitutional issues raised by the plaintiffs reach the application of due process in an area of the greatest importance to our society, the family. The constitutional infirmities recognized by this court, if uncorrected, would cause an injury to these plaintiffs far greater than a deprivation of a mere property interest. Furthermore, it has been recognized that where, as here, the plaintiff may not raise all of his constitutional claims as a defense in a *single* state proceeding, the necessary irreparability is present. *Younger v. Harris*, 401 U.S. at 46 (1971). When reviewing a statute permitting the North Carolina

authorities to take custody of children without a hearing under certain circumstances, the court in *Newton v. Burgin, supra*, observed that "the deprivation of custody prior to the civil proceeding is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the state proceeding."

Of course, we realize that the mere facial invalidity of a statute does not in itself justify federal interference. *Younger v. Harris*, 401 U.S. at 54 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. at 602 (1975). While it is clear that intervention is warranted where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *Watson v. Buck*, 313 U.S. 387, 402 (1941), such a finding is not the only justification for federal action. In *Younger* the Court explained:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the Buch case, supra, we indicated:
>
> > It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 313 U.S. at 402.
>
> Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be.

401 U.S. at 53-54.

In addition to this court's finding, *infra*, that several sections of the TEXAS FAMILY CODE are "flagrantly and patently" violative of federal constitutional requirements, the "unusual" circumstances referred to in *Younger* are present here and compel this court to grant equitable relief. Recognizing that more than a "highly unusual factual situation" must be present, *Trainor v. Hernandez*, ___ U.S. at ___, 52 L.Ed.2d at 494-95 n. 7 (1977), we find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply.

As a general expression of the extraordinary and compelling circumstances present here, this court finds an absence for these plaintiffs of "an opportunity to fairly pursue their constitutional claims in an ongoing state proceeding." *Juidice*, ___ U.S. at ___, 51 L.Ed.2d at 396 (1977) citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).[6] Unlike the plaintiff in *Juidice*, the *Sims* plaintiffs have not failed to avail themselves of any opportunities in the state procedures. Despite serious constitutional objections to its burden-of-proof requirement, the plaintiffs sought a modification of the original ex parte order pursuant to Section 17.06. Although mandated by the statute, no hearing was afforded them. Plaintiffs also sought to raise their objections in an application for a writ of habeas corpus, but, when they were prepared to seize this opportunity to be heard, the matter was transferred to Montgomery County, and, despite the parents' presence in court earlier that day, the court issued another ex parte custody order and set a hearing in Montgomery County for an uncertain time in the future. Certainly, such efforts to earn an opportunity to be heard are more than sufficient before seeking relief in federal court on April 19, 1976.

The plaintiffs' having sought through diligent efforts an opportunity to be heard in a state proceeding, this court must conclude that whatever opportunities exist for them are not such as to allow them to "fairly pursue" their constitutional objections. In reaching such a conclusion, we are mindful that "[t]he policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), quoted in *Trainor*, ___ U.S. at ___, 52 L.Ed.2d at 494 (1977). Analogized to a civil dispute, no such premise can be found here. This court has already chronicled the attempts by the plaintiffs to receive any hearing in state court. The plaintiff-parents were separated from their children for a period of 42 days without a hearing--a period ended only by an order of this court. The burdensome irregularities encountered by these plaintiffs in seeking a state forum for their constitutional claims illustrate to this court that in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues. Under such circumstances, abstention would be inappropriate. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1325 (1977).

In addition to the apparent procedural futility of requiring the plaintiffs to proceed with the pending suit, the statutory scheme on its face fares no better. The very nature of the constitutional challenge here is to the fairness of the state procedure. Such being the case, especially when compounded by the irregularities present here, it "plainly appears" that the state forum would not offer these plaintiffs adequate protection in their challenge to the state procedures, even assuming all matters could be raised in a defense to the pending "Suit Affecting the Parent-Child Relationship." *Gibson v. Berryhill*, 411 U.S. 464, 469 (1973).

Therefore, because of the failure of the state to follow its procedures and because of the futile efforts of the plaintiffs to seek relief in the state system,[7] this court finds that there is for these plaintiffs no "opportunity to fairly pursue their constitutional claims in an ongoing state proceeding."

Accordingly, this court holds that abstention is not required because *Younger* principles do not apply to this dispute between the plaintiffs and the State of Texas and, even if such principles do apply, there exist extraordinary circumstances which compel this court to provide a federal forum for the vindication of these plaintiffs' constitutional rights. Having so decided, we must address the merits of the plaintiffs' case.

II. MERITS

At the outset it must be noted that there is no dispute between the parties as to the gravity of child abuse and the compelling state interest in quickly and effectively removing the victims of child abuse from their parents. Similarly, the parties agree that where real, immediate, and irreparable physical harm is likely, the state has an interest in taking so-called "emergency" possession of the children. The gravamen of the plaintiffs' complaint is that in effectuating the legitimate state interest, the TEXAS FAMILY CODE does so in a manner which contravenes basic constitutional principles. They have mounted a broad-based challenge to Chapters 11, 14, 15, 17, and 34 of Title 2, TEXAS FAMILY CODE.

This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent. Briefly, the procedure under surveillance here begins with Chapter 34, which is concerned with the reporting of suspected child abuse and the initial investigative steps by the State Department of Public Welfare. Once suspected abuse is

identified under Chapter 34, Chapter 17 enables the State to take possession of the victims for the "Protection of [a] Child in [an] Emergency."[8] By the terms of Section 17.05(b)(2), the state may then institute a "Suit Affecting the Parent-Child Relationship." This term of art is defined in Section 11.01(5) as

> "a suit . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought."

Such a suit, therefore, refers both to a Chapter 14 proceeding, in which the appointment of a conservator is sought, and to a Chapter 15 proceeding, which is entitled "Termination of the Parent-Child Relationship."

In the suit filed by these defendants at the direction of Judge Lowry, pending in Montgomery County, only Chapter 14 relief was being sought at the time the court issued the preliminary injunction. Consequently, the defendants have questioned the standing of the Sims parents to challenge the constitutionality of any part of Chapter 15. This court finds, however, that the spectre of a Chapter 15 suit involving the Sims family is sufficient to confer standing. *See O'Shea v. Littleton*, 414 U.S. 488 (1974); *Massachusetts v. Mellon*, 262 U.S 447 (1923). The caseworker assigned to investigate the Sims family, Rex Downing, testified in his deposition that he would seek permanent termination of the parent-child relationship as part of the Montgomery County action, which is entitled broadly "Suit Affecting the Parent-Child Relationship."

It is now clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted

intrusions by the state. The Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) commented:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted.]

405 U.S. at 651. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *May v. Anderson*, 345 U.S. 528 (1953); *Griswold v. Connecticut*, 381 U.S 749 (1965); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Alsager v. Disrict Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976). Having emphasized the importance of such a right, courts are required to carefully scrutinize any attempt by a state to intrude upon it. It is axiomatic that where due process must be afforded, the courts must still decide what process is due. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). In making such an analysis, the competing interests must be identified and weighed. There are three: the liberty and privacy interest afforded to the parents, the interest of the state, as *parens patriae*, in protecting children from harm and, finally, the often silent interest of the child.

Reporting Child Abuse. Chapter 34 of Title 2, TEXAS FAMILY CODE is directed at the preliminary investigative powers of the state before any judicial relief is sought. Although recognizing the need to encourage the reporting and investigation of suspected cases of child abuse or neglect, we find that three aspects of Chapter 34 violate minimal constitutional guarantees. First, to the extent that a court order under § 34.05(c)[9] may be obtained without notice to the parents and upon any showing less than that the relief sought is necessary to aid in the determination of the existence of any abuse, it violates due process by permitting an unbridled invasion of the family unit. There is little doubt that the mandate of due process extends to an investigative stage of state action. Psychological or psychiatric examinations represent such an intrusion into the privacy of the family that, if objected to, should not be ordered without some type of adversary hearing before a judicial body. The state's interest in the protection of the child is not endangered by the requirement of such notice because of the existence, under unusual circumstances, of the course of action available under § 34.05(d).[10]

A second constitutional defect in the system of reporting child abuse appears in Section 34.08, which provides:

> The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Despite assurances from the state that the investigation permitted by Chapter 34 is "nonaccusatory," it is undisputed that the information

gathered pursuant to that chapter is used as a basis for further action by the state under Chapters 17, 14, or 15.

Although some intrusion into a family unit is permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports[11] and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Finally, with regard to Chapter 34, this court finds that Section 34.06[12] represents an unconstitutional infringement on the right to privacy and the guarantees of due process. In implementing that section, the State Department of Public Welfare has devised the Child Abuse and Neglect Report and Inquiry System (CANRIS). CANRIS is a computerized system designed to collect and store the confidential information gathered by the state from the inception of an investigation through final disposition. It is clear from the expressed purpose of CANRIS that it goes far beyond the permissible maintenance of investigatory files. The mere filing of a report of child abuse is cause enough for the system to operate. The record in this case indicates that CANRIS places labels of "perpetrator" on those parents who are ensnarled into its web--a conclusion reached by the state without any judicial determination. Similarly, CANRIS may label the

report as "validated," which by the terms of its operation manual is appropriate where "the investigating worker has proved that neglect or abuse exists." This use of information gathering and dissemination absent a judicial determination of abuse neglect is an impermissible violation of due process and right to privacy. Of course, the state may maintain investigative files. However, to the extent that CANRIS purports in any way to be a clearinghouse of child-abuse information without a judicial determination thereof, it is an unconstitutional infringement on the rights of the parents.

The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*, 424 U.S. 693 (1976). In that case, the Supreme Court held that an interest in one's reputation alone was not a "liberty" or "property" interest requiring due process before it could be altered by the State. The Court carefully distinguished "matters relating to marriage, procreation, contraception, family relationship, and child rearing and education" as being "far afield" from that plaintiff's claim. 424 U.S. at 713. Therefore, we find that the current use of a central registry for child-abuse reports is unconstitutional.

Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency.[13] An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.

Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard.[14] After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court.

Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"--language which assumes that such care or protection is needed.

It is Sections 17.05 and 17.06 that are frought with constitutional defects. After the State takes emergency custody of the child and there has been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should

be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and, instead, places a clearly unconstitutional burden on the parents, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05 (b) (2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process.

The questions remains as to how long the children, under these emergency situations, may be separated from their parents without a hearing. We regard Section 17.05's suggestion of a ten-day period to be constitutionally acceptable although, in the view of this court, the five-day period upheld in *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), would offer a better solution. The ten-day period, however, may not run from the "date of the [initial] order." Other summary deprivations of a property or liability interest have been upheld for a period measured from the date of the deprivation. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). The record in the instant case reflects that the date of the seizure and the date of the initial orders may not be the same. Therefore, what this court perceives to be the constitutional limit of ten days must run from the

date on which the State removed the children from the custody of their parents.

In particular, the State may not obtain a ten-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b) (2), institute a suit affecting the parent-child relationship and obtain another ten-day ex parte order under Section 11.11(a) (4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a twenty-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This court reiterates that under no circumstances, either under Chapter 17 or under Section 11.11(a) (4), may the State retain custody of the child for more than ten days without a complete adversary hearing with notice to the parents.

At the required hearing, the State must make a clear showing that continued custody is necessary to protect the child from physical danger. Even a temporary order under Section 11.11 may be based on no less a showing. Should the State be entitled to continued custody, the nature of the interests here require that a suit affecting the parent-child relationship should commence immediately so that the swiftest resolution of the merits may be obtained.

Standard of Proof. Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa, supra.*[15]

Appointment of Counsel. Section 11.10 provides in pertinent part:

> (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney at sic litem has been appointed for the child or unless the court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.
>
> ....
>
> (c) The court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the suit.

The plaintiffs have argued that this provision violates the due process clause of the constitution by not requiring the appointment of an attorney for the child. This court agrees. Certainly, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). In a suit for the involuntary termination of parental rights, the child's interest is generally distinct from that of either the State or the parents. In *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court recognized the separate interest of a child in a juvenile delinquency proceeding as one deserving of constitutional protection.[16] The mere fact that a proceeding under the TEXAS FAMILY CODE is labeled "civil" and a delinquency proceeding as "criminal" simplistically ignores an analysis of the real interests involved and the rights of all parties to a fair hearing. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). Therefore, in any proceeding in which the termination of the parent-child relationship is sought, the court is required to appoint counsel to represent the

interests of the child and require the parents to pay for that representation, if they are able to do so. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). If, as the statute suggests, another party would adequately represent the interests of the child, an appointment of counsel for the child would be unnecessary as long as such representation was through an attorney. Section 11.10 allows another party to represent the child only if there are no adverse interests. While this condition is constitutionally sufficient on its face, it has been applied unconstitutionally to the extent that the state itself has been appointed as the other party to represent the child. We have repeatedly herein emphasized the separate competing interests necessarily involved in any suit affecting the parent-child relationship. The interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits.

Because of the requirement of an attorney for the child at these proceedings, it follows that it must include representation at an "emergency" proceeding under Chapter 17, the result of which may be the institution of a suit for the termination of the parent-child relationship.

With regard to the appointment of counsel for the parents at any proceeding for the termination of parental rights, it is agreed that the plaintiffs in the *Sims* case, not being indigent, do not raise the issue. The *Woods* case was consolidated with the *Sims* case solely on the right of indigent parents to counsel. This court has carefully studied the arguments of counsel and we concur with the defendants that the named plaintiffs in the *Woods* case lack standing to raise that issue. The record is clear that both plaintiffs Woods and Troncosa were represented in the termination proceedings by counsel provided by the Houston Legal Foundation, a legal services corporation.

The *Woods* case is a class action pending before another judge of this court. In light of recent decisions of this Circuit, it appears that our limited consolidation of the *Woods* case before class certification was ill-advised. *See McArthur v. Southern Airways, Inc.*, 556 F. 2d 298 (5th Cir. 1977); *Satterwhite v. City of Greenville*, ___F.2d___, No. 75-3377 (5th Cir., August 12, 1977). Because there has been no decision as to the maintainablitiy of a class in that case, we only consider the standing of the two named plaintiffs and direct that the issue of the right to counsel for parents in the putative class remain pending with the *Woods* case.

Therefore, for the reasons stated herein, the court finds that the following provisions of Title 2, TEXAS FAMILY CODE--Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c), and 34.08--are unconstitutional on their face; and the defendants are permanently enjoined from applying and enforcing these provisions. Furthermore, the court finds that the use of CANRIS as provided for in Section 34.06 for information gathering and dissemination of child abuse reports absent a judicial determination of abuse or neglect and the use of Section 11.11(a)(4) in conjunction with Chapter 17 to deprive parents of custody of their children for longer than ten days without an adversary hearing are unconstitutional applications of these provisions; and the defendants are permanently enjoined from so applying or enforcing them.

Finally, the plaintiffs have sought monetary relief in the nature of actual damages and punitive damages for what the First Amended Complaint describes as a "wreckless, wilful and wanton disregard" of their rights. Upon careful consideration of the facts of this case, the nature of the constitutional challenge, and the decision of this court, we find no evidence to support the award of any monetary damages.

DONE at Houston, Texas, on the 12th day of *October*, 1977.

s/s
Joe Ingraham
Senior United States Circuit Judge

s/s
John V. Singleton
United States District Judge

s/s
Ross N. Sterling
United States District Judge

FOOTNOTES

[1] The relevant sections of Chapter 17 of the TEXAS FAMILY CODE are as follows:

Section 17.01. Taking Possession in Emergency.

An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle. . . . The child shall be delivered immediately to the court.

Section 17.02. Hearing.

Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

Section 17.03. Notice.

The proceeding under Section 17.02 of this code may be held without notice.

Section 17.04. Grounds and Disposition.

On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

Section 17.05. Duration of Order.

(a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

(1) order such restoration of possession; or

(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction.

Section 17.06. Modification.

On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child.

[2] *Section 11.11. Temporary Orders.*

(a) In a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child, including but not limited to an order:

....

(4) taking the child into the possession of the court or of a person designated by the court;

....

(b) Temporary orders under this section are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally.

[3] *Section 11.06. Transfer of Proceedings.*

(a) If venue is imporperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

[4] As an example of the Supreme Court's Permitting possible intervention after *Trainor* because of the peculiar nature of the dispute and the interests involved, *see Doe v. Maher*, 414 F.2d

1368 (D. Conn. 1976), *vacated and remanded on other grounds*, ___ U.S. ___, 45 U.S.L.W. 3820 (No. 76-878, June 20, 1977).

[5] For example, the plaintiffs complain of the methods by which child-abuse reports are received recorded and the fact that even anonymous report of child abuse will label the parents as "child abusers" in a central registry, to become part of a national registration system before any judicial proceeding of even an emergency nature. Title 2, TEXAS FAMILY CODE § 34.06.

[6] Some commentators have viewed such a finding as creating an exception of "futility" or "bias" to otherwise applicable *Younger* principles. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1324-26 (1977).

[7] In a recent case, *Ross v. Houston Independent School District*, ___ F.2d ___ (5th Cir. 1977) [Slip Opin. Sept. 8, 1977], the court held:

> The abstention doctrines do not embody jurisdictional principles nor are they to be considered as rules of law. Rather, their application is committed to the exercise of a sound discretion based on the facts of each case. *Hill v. City of El Paso, Texas*, 437 F.2d 352 (5th Cir. 1971). The piecemeal results and delays attendant to abstention should not be imposed on the parties to a federal proceeding unless state court action holds realistic promise of avoiding constitutional issues. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Any consideration of abstention, whether under *Pullman* or other doctrines ["(2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket," C. A. Wright, Law of Federal Courts, 3d ed. 218], must take into primary account its effects on the rights sought to be protected in the court asked to stay its hand.

[8] *See* Title 2, TEXAS FAMILY CODE §§ 34.05(d), *infra* at n.9, which allows the institution of a Chapter 17 proceeding during or as a result of a Chapter 34 investigation.

[9] (c) The investigation shall include a visit to the child's home, a physical and psychological or psychiatric examination of all the children in that home, and an interview with the subject child. If

admission to the home, school, or any place where the child may be, or permission of the parents or persons responsible for the child's care for the physical and psychological or psychiatric examinations cannot be obtained, then the juvenile court, or the district court, upon cause shown, shall order the parents or the persons responsible for the care of the children, or the person in charge of any place where the child may be, to allow entrance for the interview, above examinations, and investigations.

(d) If, before the investigation is complete, the opinion of the investigators is that immediate removal is necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this code for temporary care and protection of the child.

[10] *Id.*

[11] Section 34.05(e) requires the appropriate agency to make a complete written report of their investigation.

[12] *Section 34.06. Central Registry.*

The State Department of Public Welfare shall establish and maintain, in Austin, Texas, a central registry of reported cases of child abuse or neglect. The department may adopt rules and regulations as are necessary in carrying out the provisions of this section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system.

[13] The relevant portions of Chapter 17 are set out in note 1, *supra*.

[14] The standard of Section 17.01 is far more acceptable than the one found to be unconstitutional by the court in *Roe v. Conn*, 417 F. Supp. 769 (1976). In that case, Alabama Code, Title 13, § 352(4) provided for emergency custody of the child when "its welfare requires."

[15] *See also* National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 26 (1969); *Singleman*, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings, 17 ARIZ. L. REV. 1055, 1087 (1975).

[16] *Cf. Hegwood v. Kindrick*, 264 F. Sup. 720 (S.D. Tex. 1967).

APPENDIX B

JUDGMENT
DATED: February 23, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-665
Defendants.	§	
DOROTHY MAE WOODS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-1120
Defendants.	§	

JUDGMENT

Consistent with the opinion of this Court entered in the above causes on October 12, 1977, IT IS ORDERED, ADJUDGED AND DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents

before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing physical, psychological, or psychiatric examinations is necessary to aid in the investigation of abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their direction, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *23rd* day of *February*, 1978.

s/s

JOE INGRAHAM
Senior United States Circuit Judge

s/s

JOHN V. SINGLETON, JR.
United States District Judge

s/s

ROSS N. STERLING
United States District Judge

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APPENDIX C

AMENDED JUDGMENT
DATED: March 8, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-665
DOROTHY MAE WOODS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-1120

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

s/s
JOE INGRAHAM
Senior United States
Circuit Judge

s/s
JOHN V. SINGLETON, JR.
United States District Judge

s/s
ROSS N. STERLING
United States District Judge

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APPENDIX D

TEXAS DEPARTMENT OF HUMAN RESOURCES EXECUTIVE LETTER DATED MARCH 1, 1978

and

TEXAS DEPARTMENT OF HUMAN RESOURCES MEMORANDUM DATED MARCH 3, 1978

TEXAS DEPARTMENT OF HUMAN RESOURCES

EXECUTIVE LETTER

Date: March 1, 1978 **Number: 78-5**

Effective Date: March 6, 1978 **Expiration Date: December 31, 1978**

To: All Field Staff **From: Jerome Chapman, Commissioner, State Office**

Subject: Federal Court Decision Holding Unconstitutional Certain Sections of Chapters 11, 17, and 34, Title 2, Texas Family Code (John Pleasant Sims, et al. v. Raul Jimenez, et al.)

A three-judge panel of the United States District Court for the Southern District of Texas, Houston Division, has ruled certain sections of Chapters 11, 17, and 34, Title 2, Texas Family Code to be unconstitutional. The ruling permanently prohibits DHR, and all persons acting in cooperation with DHR, or at DHR direction, from applying or enforcing the provisions held unconstitutional.

Note: In this material, Chapters of the Texas Family Code will be referred to by number rather than name. Department staff must be thoroughly familiar with the names and numbers of these chapters:

Chapter 11 - General Provisions (in suits Affecting the Parent-Child Relationship)
Chapter 14 - Conservatorship, Possession and Support of Children

Chapter 15 - Termination of the Parent-Child Relationship
Chapter 17 - Suit for Protection of Child in Emergency
Chapter 34 - Report of Child Abuse

basic topics in the cases are summarized as follows:

I. Confidentiality of Case Records
II. Central Registry of Child Abuse or Neglect Cases
III. Standard of Proof
IV. Attorney Ad Litem
V. Investigative Examinations
VI. Emergency Removal

Existing policy relating to Topic, Confidentiality of Case Records, must be carefully followed. Department policies relating to Topics II through VI must be modified. Until appropriate handbook revisions can be published, the policies and procedures contained in this Executive Letter must be used in lieu of those in the indicated portions of the Handbook.

TOPIC I — CONFIDENTIALITY OF CASE RECORDS

Social Services Handbook Item 7113, (Texas Family Code, Section 34.08)

The judgment requires that DHR case records on the parents and child, except for the complainant's identity, be accessible to the parents, the child, or their representatives, so that they may be fully apprised of the nature of any accusation made by the State (DHR).

Current DHR policy provides for release of information to the parents or their representatives. When parents or their representatives ask to review DHR records, Form 4700, Request for Records of Texas Department of Human Resources, must be completed in accord with policies in Item 7113.

TOPIC II — CENTRAL REGISTRY OF CHILD ABUSE OR NEGLECT CASES

Social Services Handbook Item 7222.1, (Texas Family Code, Section 34.06)

The Court stated that the previous use of CANRIS as a clearinghouse of child abuse and neglect information without a judicial determination of abuse or neglect was unconstitutional because it was a violation of due process and the right to privacy.

However, the Court affirmed the State's (DHR's) right to maintain investigative files on child abuse or neglect and to maintain a more restricted Central Registry.

The effect of the Sims judgment is to limit client-identified information in the CANRIS system to cases in which a judicial (civil or criminal) determination of abuse or neglect has been made. The judgment allows entry into CANRIS of statistical reports without client-identified information on all reported cases. Until CANRIS can be redesigned, the following interim process will be used. It makes as few changes to the current system as possible, while meeting the requirements of the Court.

INTERIM CANRIS PROCESS

Immediately upon receiving a complaint appearing to involve abuse or neglect, the worker must make a CANRIS inquiry, unless the case is currently active and the information has already been received. The inquiry will determine if previous incidents have occurred in which a civil or criminal judicial determination of abuse or neglect was made. Only DHR staff authorized in Item 7222.1 may inquire into CANRIS. **No initial report to CANRIS will be made at the time of inquiry.**

Workers must make CANRIS reports of all abuse/neglect reports investigated and of all deaths of children reported to DHR pursuant to Section 34.02(a), Texas Family Code. As described below, client identifying information is entered into the actual CANRIS computer system only when a civil or criminal court has determined that child abuse/neglect occurred.

Workers make CANRIS reports when the investigation is completed. They update the report if court action is subsequently taken. The update is made at the time the county/district/criminal district attorney or court renders a decision on the request or referral for court action (petition filed, petition withdrawn, court order issued, etc.). The court order can be one issued after a 24-hour hearing, a 10-day hearing, when a court case is dismissed, when parental rights are terminated, or at any other appropriate time. (For more information about the 24-hour and 10-day hearings, see Topic VI below.) **There will no longer be initial reports, only finalized reports.**

CANRIS reports are made by completing Form 2202-A, Children's Protective Service Intake and CANRIS Report, and sending it or calling the information to the local telecommunications site. The terminal operator enters the report into CANRIS. Form 2202-B, CANRIS Feedback Report, with a CANRIS incident number, will be printed by the computer from information entered by the terminal operator. Form 2202-B is then mailed to the worker for filing or updating.

CANRIS reports are entered on the computer by the terminal operator in one of two formats. The terminal operator enters a **client-identified** report on only validated cases of abuse/neglect where conservatorship has been placed with DHR, conservatorship has been changed, or an individual has been convicted of a crime involving child abuse/neglect. On all other cases, the

terminal operator enters a **statistical** report with no client-identifying information.

Local cross reference controls must be established between case names and CANRIS incident numbers to ensure that client identified and client de-identified Forms 2202-B are filed in correct case folders.

Details of these CANRIS procedures will be issued to Department staff in a separate memo.

The implications for DHR of the changes in CANRIS are that the numbers of reports available for inquiry will be less than one-twentieth of the current number.

TOPIC III — STANDARD OF PROOF

Texas Family Code, Section 11.15

The Texas Family Code requires the burden of proof in a suit affecting the parent-child relationship to be measured by the "preponderance of the evidence" standard. The Sims judgment changes the burden of proof for the State (DHR) when seeking conservatorship or termination to the "clear and convincing evidence" standard.

Courts have held "clear" to mean not ambiguous, equivocal, or contradictory, and "convincing" to mean evidence sufficient to convince an unbiased and unprejudiced mind. To be admissible, clear and convincing evidence can include only those causes of harm to the child which are alleged in the petition. Staff must seek and follow legal advice about what constitutes evidence and proof to a "clear and convincing" degree.

The implication of this ruling for the Department is that staff must be precise and inclusive in their petitions. It will also be more difficult to prove cases in court since the standard of "clear and convincing evidence"

requires more quantity and/or quality of evidence and requires proof to a more certain degree than the "preponderance of the evidence" standard.

TOPIC IV — ATTORNEY AD LITEM

Social Services Handbook Item 7324, (Texas Family Code, Section 11.10)

The Court found Section 11.10 of the Texas Family Code unconstitutional since it did not require an attorney ad litem to be appointed to represent the child in all suits affecting the parent-child relationship under Chapters 14, 15, and 17 of the Texas Family Code in which DHR protective services staff sought conservatorship or termination of the parent-child relationship. In these situations, the Court found the child's interest to be generally distinct from and adverse to interests of either the State (DHR) or the parents. Since these interests are separate and competing, the child deserves the constitutional protection of representation by an attorney ad litem at all such proceedings. The Sims Court stated that the court trying the suit must require the parents to pay for the child's representation, if they are able to do so.

The Court declined to rule on the parents' right to a court-appointed attorney when the parents could not afford the services of an attorney. The issue of whether indigent parents have a right to court appointed counsel is still pending in a suit before another court.

The implication for the Department of the requirement that an attorney ad litem be appointed for the child will lie primarily in drawing the court's attention to this litem. This is a difficult issue since the courts may lack funds to pay for attorneys ad litem when the parents cannot, and the attorneys ad litem must be obtained for all hearings, including the 24-hour hearing under Chapter 17.

TOPIC V — INVESTIGATIVE EXAMINATIONS

Social Services Handbook Item 7223, (Texas Family Code, Section 34.05(c)).

The investigation currently required by Section 34.05(c), Texas Family Code, includes a visit to the child's home, a physical and psychological or psychiatric examination of all children in that home, and an interview with the referred child. If permission for admission to the home or for the examinations needed to protect the child cannot be obtained, DHR is authorized to petition the Court for an appropriate ex parte order. **Note:** An ex parte order is an order which is issued on the basis of a hearing at which only one party to the suit had the opportunity to present its side of the case.

The Sims judgment does not change any substantive requirements in 34.05(c), Texas Family Code. Because the examinations constitute an intrusion into the privacy of the family, the Court, requires an adversary hearing after notice to the parents whenever parents object to physical, psychological, or psychiatric examinations. **Note:** An adversary hearing is one in which each party to the suit has been given the opportunity through service of citation and notice to be there and each party presents its side of the case.

The adversary hearing during the investigation is initiated by filing a suit affecting the parent-child relationship and seeking appropriate action under Section 34.05(c), Texas Family Code. The required notice to the parents is satisfied by serving them citation, including a copy of the petition and notice of the time of the hearing. DHR must show that the required examinations are necessary to determine the existence of abuse or neglect.

The Court was careful to point out that the State's (DHR's) interest in the protection of the child is not endangered by the requirement for a hearing because of the existence of Section 34.05(d), Texas Family Code, which allows for emergency protection under Chapter 17, Texas Family Code. That is, if these examinations are required to protect a child in an emergency, the Department may take emergency custody of the child and consent to the examinations after the 24-hour hearing (see Topic VI below).

Requiring an adversary hearing before seeking psychological or psychiatric examinations of children when parents refuse to consent to them will probably have minimal implications for the Department because of the following factors:

1. The Department seldom seeks psychological or psychiatric examinations under these circumstances because they are seldom needed to protect children from death or permanent harm.

2. If the child is in a situation of immediate danger to his physical health or safety, the Department can seek managing conservatorship to obtain the right to consent to the examination. (See paragraphs on ex parte court ordered removal and emergency removal under Topic VI below.) However, this will require more drastic action than the Department has formerly been required to take.

Requiring an adversary hearing before seeking physical examinations of children when parents refuse to consent to them has considerable implications for the Department in attempting to protect children. Although ex parte court-ordered physical examinations are not frequently sought during the investigation, they are always sought when the child appears to be in

danger of possible death or permanent harm and the parents refuse to allow physical examination and treatment. Under Sims, to obtain the examination, the Department must wait until an adversary hearing can be held and thus leave the child in potential danger for a period of time, or the Department must obtain conservatorship for the purpose of consenting to the examination, which involves as much or more of an intrusion into the family's privacy and parental rights than previously required by an ex parte court order for the examination.

TOPIC VI — EMERGENCY REMOVAL

Social Services Handbook Item 7330, (Texas Family Code, Section 17.01 et seq)

The Court recognized the interest of the State (DHR) in protecting children from abuse and neglect as quickly as possible. The Court approved the current language in Section 17.01, Texas Family Code, that allows DHR to take custody of a child to protect him from an immediate danger to physical health or safety. However, the Court found that Sections 17.02, 17.03, 17.05, and 17.06 violated parents' constitutional rights by not requiring that the Department:

1. Make every reasonable effort to serve notice on the parents that a hearing on the removal will be held within 24 hours after removal.

2. Hold an adversary hearing within 10 days of removal, with service of citation and notice to the parents if continued custody is sought.

Before removing a child in an emergency, the Department must consider the following courses of action in the priority of their listing. The worker and supervisor must document the reasons why a court

action earlier on the following list is not taken before taking one later on the list.

1. **Court-ordered removal** — Remove the child pursuant to a written court order which is based on a Chapter 14 or 15 suit filed by DHR and which is issued following an adversary hearing.

2. **Ex parte court-ordered removal** — Remove the child pursuant to a written ex parte court order, which is based on a Chapter 14 or 15 suit filed by DHR and which is issued under the authority of Section 11.11(a)(4). An adversary hearing must be scheduled within 10 days after the date of the court order and the parents served with citation and notified of the hearing. The ex parte order must be a written order; it cannot be a verbal order.

3. **Emergency removal** — Remove the child pursuant to Chapter 17 without a court order, with an ex parte hearing to be held within 24 hours after removal. An adversary hearing must be scheduled within 10 days after the date of removal and the parents served a citation and notified of the hearing. This ex parte order must be a written order; it cannot be a verbal order.

DHR defines emergency removal as removal of a child from his home or other place where he is receiving care without written parental consent and before a court order is obtained. **Emergency removal can be made only as a last resort in protecting a child. Emergency removal can be made only when all of the following factors can be documented:**

1. The child is in a situation which is of immediate danger to his physical health or safety. Immediate physical danger does not include emotional, potential, non-emergency, or non-physical abuse/neglect.

2. Ex parte court-ordered removal procedures cannot be carried out in sufficient time to protect the child from physical harm. That is, the worker has reasonable evidence, which he can verify and document, that the child would suffer physical harm between the time the worker could leave the child and the time he could return with the ex parte court order authorizing removal.

3. Available resources to protect the child in his home have been considered and found to be insufficient. Examples of these resources are emergency homemaker, protective day care, a relative or neighbor staying with the child in the home, or other similar types of resources.

If the worker and supervisor decide within the scope of the above factors that emergency removal of a child from his home is necessary, a law enforcement officer or Investigation Division staff person must accompany the worker when the child is removed from the home. If neither is available, the reason must be documented in the file and the concurrence of a social services program director must be obtained to authorize the child's removal. In addition, a protective service supervisor or another worker or DHR employee must accompany the worker when the child is actually removed. The person who accompanies the worker should attend the 24-hour hearing. If the worker was not accompanied by a law enforcement officer or Investigation Division staff person, the worker or supervisor must report the circumstances of the removal to the regional director for social services within 24 hours of the removal.

The Texas Family Code stipulates that the worker may remove a child without civil liability if the worker has reasonable cause when he removes the child to believe there was an immediate danger to the child's physical

safety (Texas Family Code, Section 17.09). The worker must verify whatever gave him "reasonable cause" to believe the child was in immediate danger and must document his verification in the case record.

All of the following steps must be taken after removing a child from his home under Chapter 17:

1. DHR must make every reasonable effort to serve notice on the parents. When the parents can be located, the worker must inform the parents orally or in writing that a hearing will be held within 24 hours, that they have the right to obtain the services of an attorney to represent them at that hearing, and of the location of the district court where the hearing will be held. DHR must document its efforts to inform the parents and should try to verify its efforts with witnesses.

2. Immediately after removal, DHR must bring the child physically before the court. (The Sims opinion states that "immediately" means within 24 hours of actual removal, "barring unusual circumstances," which it did not define.) A petition must be filed at or before the time the child is delivered to the court and a hearing is held. This means that district judges, county/district/criminal district attorneys, children's attorneys ad litem, Investigation Division or law enforcement staff, and DHR workers must be available seven days a week and 365 days a year to participate in Chapter 17 emergency removal proceedings.

   Oral authorization from the judge to remove the child cannot substitute for or eliminate the need for the 24-hour hearing required under the Sims judgment.

   If the hearing cannot be held because the district judge or county/district/criminal district attorney

cannot attend, the worker must return the child to the home and provide whatever services are possible to protect the child from death or other permanent physical harm. In these instances, the worker must inform in writing the district judge, county/district/criminal district attorney, local law enforcement officials, the regional attorney, and the regional director for social services of the child's circumstances. The danger to the child must be clearly stated.

3. Before or at the 24-hour hearing, DHR must file a Chapter 17 suit by and through the county/district/criminal district attorney and pursuant to Section 17.02, Texas Family Code. If evidence of the child's needs indicates possible need for continuing custody past the 10-day order, DHR should ask the county/district/criminal district attorney to join a Chapter 14 or 15 suit with the Chapter 17 suit. If the Chapter 17 suit is not filed in the county of the child's residence, a petition under Chapter 14 or 15 must be filed in the court of continuing jurisdiction. This should be done as soon as possible during the 10-day emergency order.

4. Before or at the 24-hour hearing, the court must appoint an attorney ad litem for the child.

5. At the 24-hour hearing, the court must determine whether the child is without support and is dependent on society for protection or is in immediate danger of physical injury, as set out in Section 17.04, Texas Family Code. If the court finds that the child is in either situation, the court may issue a 10-day emergency order (dating from the time of actual removal), naming the Department as temporary managing conservator. If the parents are present at the 24-hour hearing, they should be served while there with citation, including a copy of

the petition, and with the show cause order and notification for the 10-day hearing. If they are not present, the Department must make every reasonable effort to locate them and arrange for service of citation and notice to be made before the 10-day show cause hearing.

When the Chapter 14 or 15 suit is joined with the Chapter 17 suit, or otherwise filed in the court of continuing jurisdiction, the court must:

a. Order a show cause hearing on the Chapter 14 or 15 suit to be held before the 10-day emergency order expires.

b. Order service of citation and notice on the parents for the 10-day show cause hearing.

c. Make other orders as necessary for the 10-day show cause hearing, such as child support responsibilities of the parents or appointment of an interpreter for deaf parents.

6. The worker must get a written copy of the 10-day emergency order as soon as the court makes it available. This order expires as soon as either:

   a. The child is returned to the parents; or

   b. A Chapter 14 or 15 order is entered at the 10-day show cause hearing; or

   c. Ten calendar days have passed since the actual removal of the child.

DHR may not retain custody of a child for more than 10 calendar days from actual removal without an adversary hearing. The Court's opinion about this requirement is clear and unambiguous. The Court says:

> "...The State (DHR) may not obtain a 10-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b)(2), institute a suit affecting the parent child relationship and obtain another 10-day ex parte order under Section 11.11(a)(4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a 20-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This Court reiterates, that under no circumstances, either under Chapter 17 or under Section 11.11(a)(4), may the State (DHR) retain custody of the child for more than 10 days without a complete adversary hearing with notice to the parents."

The 10-day show cause hearing must be an adversary hearing at which DHR must prove each of the following:

1. That the child was and would be in physical danger in the home.

2. That continued conservatorship is necessary to protect the child from such physical danger.

3. That the action requested is in the best interest of the child.

If the parents were not served for and failed to appear at the 10-day show cause hearing, DHR must document its efforts to locate the parents. If the child is not returned to his parents after the 10-day show cause hearing, a temporary order under Section 11.11 pursuant to Chapter 14 or 15 suit must be signed pending final adjudication. Such temporary orders signed after adversary hearings are generally indefinite unless limited to a specific time period. Remember, under

Sims, to keep a child continuously for more than 10 days, a Chapter 11 order may follow a Chapter 17 order only when an adversary hearing, that is a hearing for which the parents received service of citation and notice, occurred within 10 days of the child's removal.

DHR staff, under the direction of the county/district/criminal district attorney, must assess at each step in a Chapter 17 suit whether Sims judgment is being followed. If staff question at any time whether legal custody has or will become invalid because the Texas Family Code as affected by the Sims judgment has not been or will not be followed, legal advice must be immediately sought. DHR staff must document the legal counselor's response to their concern by filing in the child's case record correspondence to or from the legal counselor. **If the attorney believes that DHR does not have valid legal custody of the child, DHR must immediately satisfy the legal requirements for a valid court order, if that is within its power, or immediately return the child to the parents, regardless of the danger in which DHR believes this will place the child.** If the attorney or court believes the court order is valid but the Department disagrees because of one of the following or like reasons, Department staff must immediately satisfy the requirement for a valid court order or return the child to his parents:

1. There is not a written court order within 24 hours of the removal.

2. More than 10 calendar days have passed since the child was removed and no other valid order has been obtained.

3. DHR failed to make every reasonable effort to inform the parents of the 24-hour hearing.

If DHR must return the child, a program director must approve the return and the regional attorney and regional director for social services must be advised before hand. Before returning the child, DHR must report to the court in writing its planned actions, the reasons why DHR believes it must take this action, the danger DHR believes the child will be in, and the documentation of the legal counselor's belief about the invalidity of the court order. A copy of this court report must be placed in the case record.

If it is anticipated that the child may have to be returned because of a potentially invalid 24-hour order but evidence indicates the child would be in danger of physical harm in the home, DHR should ask the county/district/ criminal district attorney to obtain a valid ex parte order for retaining custody of the child. **If this action is taken, the child can not be kept in DHR custody for more than 10 days from the date the child was originally removed from the home.**

If the child is returned home because of an invalid court order, DHR must continue supervision of the child in the home.

If removal again appears necessary, DHR must consider the effect of repeated removals on the child, especially repeated unplanned removals, and the intent of the Sims judgment to protect parents' due process rights. DHR must fully and clearly document why it believes removal is again necessary and why alternate actions were not taken.

MISCELLANEOUS

This memorandum will be sent to all district judges and county/district/criminal district attorneys. Regional DHR staff must meet with these legal representatives after receiving this material to establish local

procedures for carrying out the requirements of the judgment.

Immediately upon receiving this material, the regional administrator must arrange for a meeting of all regional child protective service staff to discuss the implementation of this material in the region. The meeting should be led jointly by the regional attorney and regional director for social services.

This Executive Letter supplements or supercedes Information Letter 78-4, Legal Rights of Parents and Children in Child Protective Services, in so far as this Executive Letter either contains fuller information or is in conflict with the Information Letter.

If your have further questions, please discuss them with your regional attorney or contact Fred Biel, General Counsel, Legal Services Division, John. H. Reagan Building, Austin, 78701, 512/475-2006 (STS, formerly Tex-An, 822-2006); or Kay Love, Program Specialist, Protective Service for Children Division, John. H. Reagan Building, Austin, 78701, 512/475-6481 (STS 822-6481).

s/s

Jerome Chapman

JC:fh

MEMORANDUM

TEXAS DEPARTMENT OF HUMAN RESOURCES

SUBJECT: Sims v. Jiminez, et al

TO:
All Regional Administrators

FROM:
Jerome Chapman
Commissioner
Department of Human Resources
State Office, 000-0

DATE: March 3, 1978

The request which has been made by the Department for a stay of the Sims judgment pending appeal has not yet been acted on by the Court. However, the Court has indicated it will revise the judgment with respect to Section 34.05(c) of the Family Code by not requiring an adversary hearing before obtaining a court order for *physical* examinations.

Consequently, the E-letter and judgment will be effective March 6th, 1978, except for those portions concerning the requirement for an adversary hearing to seek physical examinations under Section 34.05(c). The Department is continuing to seek relief pending its appeal, and you will be informed of any further court action in this case which modifies this directive.

s/s

Jerome Chapman

JC:jbm

cc: All Regional Attorneys
All Regional Directors for Social Services
Merle Springer, 500-0
Frederick J. Biel, 170-0
Richard E. Orton, 525-0
Bobbie Mae Matthews, 530-0
Colin Carl
Homer Rodriquez, 700-0

APPENDIX E

NOTICE OF APPEAL
DATED: APRIL 20, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS AND SHAWANA EVETTE SIMS,	§	
Plaintiffs	§	
vs.	§	Civil Action No.
HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, GENE LEGE, INDIVI-	§	76-H-665

DUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,	§
Defendants	§

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Notice is hereby given that Hilmar G. Moore, Raul Jimenez, Jamie H. Clements, Jerome D. Chapman, Gene Lege, and Marian Lockley, defendants herein, hereby appeal to the Supreme Court of the United States from the Amended Judgment entered in this action on March 8, 1978.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States has on this *18th* day of April, 1978, been sent by United States Postal Service, certified, return receipt requested, to the following:

Gladys R. Goffney
201 Main Street - Suite 542
Houston, Texas 77002

Nell H. Holloway
201 Main Street - Suite 542
Houston, Texas 77002

Jerry L. Gardner
910 Houston Bar Center Bldg.
Houston, Texas 77002

Martin J. Grimm
1318 Pech Road
Houston, Texas 77055

J. Patrick Wisemen
905 Richmond Avenue
Houston, Texas 77006

John Carter
GULF COAST LEGAL FOUNDATION
Successor to
HOUSTON LEGAL FOUNDATION
609 Fannin - Suite 1909
Houston, Texas 77002

s/s

C. J. CARL
Assistant Attorney General

APPENDIX F

MOTION TO STAY INJUNCTION PENDING APPEAL

and

ORDER DENYING MOTION DATED MARCH 15, 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS, ET. AL.,	§	
Plaintiffs	§	
vs.	§	CIVIL ACTION NO.
	§	76-H-665
RAUL JIMINEZ, ET. AL.,	§	
Defendants	§	

MOTION TO STAY INJUNCTION PENDING APPEAL

TO THE HONORABLE DISTRICT COURT:

COMES NOW Raul Jimenez, et al, Defendants above named, and respectfully present this their application to stay the injunction granted in this case under the provisions of Rule 62(c), Federal Rules of Civil Procedure, because it is the bona fide intention of said Defendants to make proper and timely appeal to the Supreme Court of the United States.

The grounds upon which this application for stay are based are as follows:

1. That Defendants will be appealing the decision on the basis that this District Court should have abstained, and Defendants therefore request a stay of the judgment in its entirety.

2. That to prohibit the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as

provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Defendants unless the stay is granted and would cause substantial harm to the public interest by inhibiting the state's ability to gather information about and investigate suspected cases of child abuse.

3. That to apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Defendants and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect.

4. That to require the appointment of an attorney ad litem for a child in all suits affecting the parent-child relationship in which the State is a party, especially as early as the one-day or 24-hour ex parte hearing, would be impossible since the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code.

5. That to require notice and hearing to parents prior to authorizing under Section 34.05(c) of Title 2 of the Texas Family Code physical examinations of children who are abused or neglected would dangerously delay treatment to children who are in need of emergency medical attention.

The grounds upon which Defendants' appeal will be based are substantially as stated above and for the reasons stated, Defendants respectfully request a stay of

the judgment of this District Court pending appeal by the Defendants.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Defendants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion to Stay has been sent by United States Postal Service, postage prepaid, certified, return receipt requested, to Ms. Gladys R. Goffney, 201 Main Street - Suite 504, Houston, Texas, 77002 and to Ms. Nell H. Holloway, 201 Main Street - Suite 504, Houston, Texas, 77002, and to Mr. John Carter, Gulf Coast Legal Foundation, successor to Houston Legal Foundation, 609 Fannin - Suite 1909, Houston, Texas, 77002, on this the *28th* day of February, 1978.

s/s

C. J. Carl

1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS,
ET AL.

V.

CIVIL ACTION NO.
76-H-665

STATE DEPARTMENT
OF PUBLIC WELFARE,
ET AL.

O R D E R

Having duly considered defendants' motion to stay pending appeal the injunction granted in the above-styled-and-numbered cause, the court finds the stay should not be granted.

Accordingly, it is hereby ORDERED, ADJUDGED, and DECREED that defendants' motion to stay injunction be, and is, DENIED.

DONE at Houston, Texas, on the *15th* day of *March*, 1978.

s/s

United States District Judge

APPENDIX G

APPLICATION FOR STAY OF AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION TO THE HONORABLE LEWIS F. POWELL, JR.

and

LETTER FROM CLERK OF UNITED STATES SUPREME COURT WITH NOTATION "Denied L.F.P. 3/29/78"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

RAUL JIMENEZ, ET AL.,

Petitioners

vs.

JOHN PLEASANT SIMS, ET AL.,

Respondents

APPLICATION FOR STAY OF JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

TO THE HONORABLE LEWIS F. POWELL, JR., ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

Petitioners pray that an order be entered staying the judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on February 23, 1978, and amended on March 8, 1978, pending appeal and a final determination of the matter

by this Court. In support of this application, Petitioners respectfully show as follows:

1. This suit was instituted in the United States District Court for the Southern District of Texas, Houston Division by Respondents, seeking (a) a declaratory judgment that portions of Chapterms 11, 14, 15, 17, and 34 of Title 2 of the Texas Family Code are unconstitutional, (b) a permanent injunction barring the use of these provisions by the Texas Department of Human Resources, and (c) monetary relief.

2. The three-judge District Court entered a judgment for Respondent on February 23, 1978, which was amended on March 8, 1978. Copies of the memorandum opinion and judgment, and amended judgment are attached to this application.

3. In a motion filed in the District Court, Petititoners requested that the injunction be stayed in order to permit Petitioners to appeal the judgment to this Court. The District Court on March 15, 1978, denied the motion for a stay. Copies of that motion and order are attached to this application.

4. The jurisdiction of this Court to review the case on appeal rests upon 28 U.S.C. § 1253. Jurisdiction to issue the stay requested is granted by Rule 18 of the Supreme Court Rules.

5. *The irreparable injury to Petitioners.*

(a) To prohibit the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Petitioners unless the stay is granted and would cause

substantial harm to the public interest by inhibiting the State's ability to gather information about and investigate suspected cases of child abuse. Note that the information in question is not disseminated to, or even available to, the general public or anyone else other than certain selected staff of Petitioners who are directly involved in investigating alleged abuse.

(b) To apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard of a preponderance of the evidence currectly set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Petitioners and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect. Such a "higher" standard could also be used to overturn previously valid terminations, and subsequent adoptions, directly contrary to the best interests of the children involved.

(c) To require the appointment of an attorney ad litem for a child in each suit affecting the parent-child relationship in which the State is a party as early as the one-day or 24-hour ex parte hearing would cause irreparable harm to Petitioner. Such appointment is not only impossible as to Petitioners because the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code, it is further inappropriate since such ex parte hearing is nothing more than the equivalent of a temporary restraining order hearing.

(d) To require an emergency hearing to be held under Section 17.02 of Title 2 of the Texas Family Code within one day or 24 hours of seizure of a child in

emergency circumstances, without regard to whether the next day is a scheduled work day, would cause irreparable harm to Petitioners because to do so would always be impossible in some rural areas of the State, and frequently impossible in even urban areas of the State when a district judge was not available within 24 hours or could not hold the one-day or 24-hour hearing on the weekend.

6. Moreover, the Petitioners will be appealing the decision on the basis that the District Court should have abstained under the comity and federalism principles set out in *Younger v. Harris*, 401 U.S 37 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 97 S.Ct. 1211 (1977); and *Trainor v. Hernandez*, 97 S.Ct. 1911 (1977).

7. The abstention doctrine, as well as the Court below's massive interference with the State's judicial processes cause Petitioners to request a stay of the judgment in its entirety. However, should this Court believe a stay of the entire judgment is not appropriate, Petitioners implore the Court to stay the judgment of the District Court in so far as it holds that the Petitioners are bound to return endangered children to potentially life threatening or other physically endangering situations because a state district judge fails to hold an ex parte hearing or appoint an attorney ad litem within one day or 24 hours of seizure, regardless of the availability of such a judge or whether an ex parte hearing is not held literally within 24 hours of the removal of the child(ren) from physically hazardous circumstances.

WHEREFORE, Petitioners pray that the judgment of the United States District Court for the Southern District, Houston Division, or at least the certain above set forth portions of it, be stayed pending appeal and a final determination of the matter by this Court.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys for Petitioners

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Application for Stay of Judgment of United States District Court for the Southern District of Texas, Houston Division, has been sent sent to Ms. Gladys R. Goffney, 201 Main Street - Suite 504, Houston, Texas 77002, to Ms. Nell H. Holloway, 201 Main Street - Suite 542, Houston, Texas, 77002, and to Mr. John Carter, Gulf Coast Legal Foundation, Successor to Houston Legal Foundation, 609 Fannin - Suite 1909, Houston, Texas, 77002, by United States Postal Service, Certified, Return Receipt requested, postage prepaid, on this the 23rd day of March, 1978.

s/s
C. J. CARL

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 29, 1978

C. J. Carl, Esquire
Asst. Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Re: Raul Jimenez, et al. v. John Pleasant Sims, et al., A-815

Dear Mr. Carl:

Your application for stay in the above-entitled case has been presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied
L.F.P.
3/29/78"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By s/s

Peter K. Beck
Assistant Clerk

th

cc: Ms. Gladys R. Goffney
201 Main Street
Suite 504
Houston, Texas 77002

Ms. Nell H. Holloway
201 Main Street
Suite 542
Houston, Texas 77002

John Carter, Esquire
609 Fannin
Suite 1909
Houston, Texas 77002

Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 78-6[redacted]

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

VOLUME II

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant
Attorney General

DAVID H. YOUNG
STEVE BICKERSTAFF
C. J. CARL
Assistant Attorneys General

Attorneys for Appellants

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

On Appeal From The United States District
Court For The Southern District Of Texas
Houston Division

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APPENDIX H

APPLICATION FOR STAY OF AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISON TO THE HONORABLE WILLIAM H. REHNQUIST MAILED JUNE 6, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

RAUL JIMENEZ, ET AL.,
Appellants

vs.

JOHN PLEASANT SIMS, ET AL.,
Appellees

APPLICATION FOR STAY OF AMENDED JUDGMENT OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

TO THE HONORABLE WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT:

Appellants pray that an order be entered staying the Amended Judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on March 8, 1978, pending appeal and a final determination of the matter by this Court, only in so far as such Amended Judgment would compel the emergency ex parte hearing, pursuant to Chapter 17 of Title 2 of the Texas Family Code, to be held "[not]

beyond the very day of seizure [of a child]." In support of this application, Appellants respectfully show as follows:

1. The Appellees instituted this suit in the United States District Court for the Southern District of Texas, Houston Division, seeking declaratory and injunctive relief holding various provisions of Chapters 11, 14, 15, 17, and 34 of Title 2 of the Texas Family Code unconstitutional.

2. On February 23, 1978, the three-judge District Court entered Judgment for Appellees granting a permanent injunction barring the use of certain provisions of the Texas Family Code by the Texas Department of Human Resources. Copies of the Memorandum Opinion, the Judgment, and the Amended Judgment are attached to this application, as Exhibit A.

3. In a motion filed in the District Court, Appellants requested that the injunction be stayed pending appeal from the Amended Judgment to this Court. On March 15, 1978, the District Court denied that motion for a stay. Copies of the motion and order are attached to this application as Exhibit B.

4. In an application filed with the Honorable Lewis F. Powell, Jr., Circuit Justice for the Fifth Circuit, Appellants requested that certain portions of the injunction be stayed while the appeal to this Court was pursued. On March 29, 1978, Associate Justice Powell denied that application for a stay. Copies of that application and the denial thereof are attached to this application, as Exhibit "C".

5. The jurisdiction of this Court to review this case on appeal rests upon 28 U.S.C. §§ 1253 and 2101(b). Notice of appeal was filed on March 20, 1978. A copy of that

notice is attached as Exhibit D. Authority to issue the stay requested is provided in Rule 18 and 51 of the Supreme Court Rules.

6. Appellants will be seeking review by this Court of several aspects of the three-judge court's Amended Judgment enjoining enforcement of various provisions of the Texas Family Code. However, the purpose of the instant application for a stay is to seek immediate and temporary relief from only one aspect of the Amended Judgment of the court below.

7. Appellants' primary contention on appeal will be that the civil progeny of *Younger v. Harris*, 401 U.S. 37 (1971) have extended the dictates of comity abstention to the facts of the instant case. Moreover, the lesson of *Rizzo v. Goode*, 423 U.S. 362 (1976) that prophylactic injunctive prohibitions against supervisory level and executive personnel who have not participated in the alleged constitutional violations are invalid and improper, will be raised. These principles will be shown to be particularly applicable in a situation where the real object of the lower federal court's intrusion is the state judiciary, rather than the nominal named defendants who are Appellants herein. The real defendants who made the decisions complained of were dismissed from the instant case apparently on the basis of judicial immunity; however, the policy-making board, the top administrator, and two line supervisors of the Texas Department of Human Resources were left in the case.

The Court below held ten provisions of the Texas Family Code unconstitutional. Only two of the ten (Sections 34.06 and 34.08) are even colorably within the control of the Texas Department of Human Resources and its employees. The questions presented in the appeal will raise substantive issued about several of the

District Court's holdings. However, this instant application seeks a stay only of the most egregious invasion of the operation of the state's judicial system.

While approving the statutory basis upon which the emergency seizure of a child may take place, the court below held that the initial statutorily mandated hearing was constitutionally defective in not being required to be held "immediately." In describing the due process standard it was imposing, the District Court said, "Barring unusual circumstances, . . . this ex parte presentation to a judicial authority [may not be held] beyond the very day of seizure." If there had been any doubt that this language means that the emergency hearing must be held within 24 hours of the time a child is taken into possession, the managing judge resolved it at a conference with counsel for all parties in his chambers in January 1978. After the Judgment was entered, Defendant Commissioner Jerome Chapman so advised all field staff in Executive Letter 78-5, a copy of which is attached as Exhibit E.

The reaction of state district judges, who have jurisdiction over emergency suits under Chapter 17, as well as other actions pursuant to Title 2 of the Texas Family Code, is evidenced by the letters and orders from Judges Cole, Hester, Shackleford, Moore, and Gibson, copies of which are attached as Exhibits F, G, H, I, and J, respectively. Clearly child protective service workers do not have it within their power to compel compliance with the federal district court's insistence that the emergency ex parte hearing be held within 24 hours of removal. If no state district judge is able or willing to conduct the required hearing on a weekend, keeping possession of a child subjects a worker to the risk of a suit for damages by the parents. But to return a child removed from a life-threatening or otherwise physically endangering situation would subject the worker at least to contempt proceedings by state district judges.

There is nothing unreasonable about waiting until the next scheduled work day before conducting an emergency ex parte judicial hearing concerning the seizure of a child to protect him from an immediate danger to his health or physical safety. That is the rule provided by Title 3 of the Texas Family Code regarding the detention of "Delinquent Children and Children in Need of Supervision." (Sections 53.05(c) and 54.01(a)). It seems highly doubtful that the United States Supreme Court would ultimately hold that it is a denial of due process of law to wait until the next scheduled workday to hold an ex parte emergency hearing concerning a child removed pursuant to Title 2 of the Texas Family Code.

The simple truth of the matter is that compliance with the three-judge district court's Memorandum Opinion and Amended Judgment in regard to holding the emergency hearing necessary to seek and obtain judicial ratification of the seizure of a child in "extraordinary circumstances" will result in the return of abused and neglected children to potentially life-threatening or otherwise physically endangering situations, because many, if not most, Texas state district judges either cannot or will not hold the emergency ex parte hearing on weekends. Frequently, in most rural areas of the state and often in some urban areas of the state, no district judge will actually be physically available for such a hearing. Are the little children to suffer for this?

WHEREFORE, Appellants pray that the Amended Judgment of the United States District Court for the Southern District, Houston Division, be stayed pending appeal and a final determination of the matter by this Court, in so far as such Amended Judgment would compel the emergency ex parte hearing, pursuant to Chapter 17 of Title 2 of the Texas Family Code, to be held "[not] beyond the very day of seizure [of a child]," in

order to allow the holding of such hearing on the next scheduled workday.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

s/s

C. J. CARL
Assistant Attorney General

Attorneys For Appellants

P.O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Application for Stay of Amended Judgment of United States District Court for the Southern District of Texas, Houston Division has on this the *6th* day of June, 1978 been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

JOHN QUINCY CARTER
ROBERT BYRD
WENDELL E. COOPER PORTER
Gulf Coast Legal Foundation
609 Fannin Street, Suite 1900
Houston, Texas 77002

MARTIN J. GRIMM
1318 Pech Road
Houston, Texas 77006

s/s

C. J. CARL
Assistant Attorney General

Exhibits A through E have not been reproduced with this Application as they have been reproduced elsewhere in this Appendix.

EXHIBIT F

March 22, 1978

The Honorable John Hill
Attorney General
Capitol Station
Austin, Texas 78711

ATTN: Mr. Colin J. Carl

RE: Sims Case

Dear General Hill:

This letter is in reference to the above case which is now pending in the Federal Courts.

Judge Robert L. Lowry, Judge W. H. Miller and I had the privilege of advising with the Honorable John Singleton, U.S. District Court concerning the Judgment entered in this case, declaring certain portions of Title 2 of the Texas Family Code unconstitutional. After visiting with Judge Singleton, I have concluded, and I believe Judge Lowry and Judge Miller will most likely concur, that the proposed Order and Rules, which are attached for your information, will correct any constitutional deficiencies of Title 2 of the Texas Family Code.

We, the three Judges who hear termination suits filed by the State, have not formerly approved the proposed Order and Rules because Judge Lowry is out of the City this week, and I will be out of the State for the next three weeks, but we will attempt to finalize the Order and Rules at the earliest possible time.

The Judgement entered by the Federal Court requires that the burden of proof is on the State to prove its case

by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship. It is my opinion that this is a procedural matter and that it is mandatory that the State courts continue using the burden of proof which is the preponderence of the evidence set out by our statute and the Supreme Court of Texas until there is further instruction from the Federal Court.

Respectfully submitted,

Criss Cole
CC/mg
encls.
cc: Judge Robert L. Lowry
Judge W. H. Miller
Judge Sam Emison

Mr. George Ford
Harris County Child Welfare Unit

Mr. Fred Biel
General Counsel
Legal Services Div.
State Department of Human Resources
John H. Reagan Bldg.
Austin, Texas 78711

March 29, 1978

Honorable Criss Cole
Judge of the 315th District Court
Family Law Center Building
Houston, Texas 77002

Re: Sims Case

Dear Judge Cole:

I appreciate receiving your letter concerning the subject case. Of course I was not privy to your conversation with Judge Singleton, but it appears to us that the memorandum opinionis unequivocal regarding the standard of proof in the trial on the merits of any suit affecting the parent-child relationship when it states that "the fundamental right to family integrity requires at the very least that the State . . . prove its case by clear and convincing evidence." It is our conclusion that to use the preponderance of the evidence standard in a suit affecting the parent-child relationship involving the State, absent a stay or until reversal on appeal, would be in direct contravention of the United States District Court's Amended Judgment and consequently would risk the voiding of any results reached under the statutory standard.

The rules which you and Judges Lowry and Miller propose to adopt regarding the ex parte hearing under Chapter 17 present another problem, based on a conversation in which I participated along with the plaintiffs' attorneys in the subject case with Judge Singleton in his chambers in January of this year. I asked Judge Singleton the meaning of the language of the memorandum opinion requiring the holding of the ex parte hearing "[*not*] beyond the very day of seizure [of a child]." I understood him to indicate that the court

meant within 24 hours and subject to no general exceptions (such as weekends or legal holidays). Since we think the reasonable requirement regarding holding this ex parte hearing would be to have it the next scheduled workday, I would be pleased to learn that I misunderstood him.

Thus, we are appealing both the standard of proof holding and the failure to take into account the normal work week when establishing the constitutional standard for holding the equivalent of a TRO hearing (the immediate ex parte hearing under Chapter 17). As you may know we are also planning to appeal the holding regarding CANRIS and the requirement that the attorney ad litem for the child be appointed as soon as the immediate ex parte hearing (which is analogous to a TRO hearing), an aspect which is not explicitly stated in the memorandum opinion, but which Judge Singleton explained at the conference in his chambers in January.

Finally, with regard to your proposed order concerning the physical presence of the child at the immediate ex parte hearing, I do not have any disagreement. Though the memorandum opinion of the United States District Court in the subject case seems to assume physical delivery, it certainly does not mandate it. Thus, I think your proposed order represents the proper and reasonable approach.

Sincerely,

C.J. Carl
Assistant Attorney General

CJC/fd

cc: Honorable Robert L. Lowry
Honorable W. H. Miller
Honorable Joe Ingraham
Honorable John V. Singleton, Jr.
Honorable Ross N. Sterling
Mr. George Ford
Mr. Fred Biel

March 30, 1978

Mr. Fred Biel, General Counsel
Legal Services Division
John H. Reagan Bldg.
Austin, Texas, 78701

Re: Procedures Implemented by Harris County Courts In Response To Sims Decision

Dear Sir:

Recently you received a copy of a letter from Judge Criss Cole, 315th District Court, Harris County, Texas to Attorney General Hill. Also, you received a copy of a proposed Order and Rules of the three Harris County Courts hearing petitions brought by the Harris County Child Welfare Unit.

As Judge Cole states in his letter, it is his opinion that the proposed Order and Rules correct any constitutional deficiencies of Title II of the Texas Family Code. The proposed Order and Rules were drafted after Judges Cole, Lowry, and Miller had discussed the *Sims* judgment with Judge Singleton.

The proposed Order and Rules conflict with Departmental policy set forth in the letter concerning the *Sims* decision from Commissioner Chapman to all field staff. The Harris County Courts reviewed the Departmental policy prior to preparing the proposed Order and Rules.

Please take appropriate steps to reconcile the conflict between the proposed Order and Rules and Departmental policy. Thank you for your assistance.

Sincerely,

s/s

George Ford
Agency Attorney

cc: Judge Criss Cole, 315th District Court
Judge Robert L. Lowry, 313th District Court
Judge W. H. Miller, 314th District Court
Judge Sam Emison, 257th District Court
Mr. Colin Carl, Assistant Attorney General
Mr. Howard Stomel, Regional Attorney

May 2, 1978

George Ford, Agency Attorney
Harris County Child Welfare Unit
4040 Milam, Suite 301
Houston, Texas 77006

Dear Mr. Ford:

Attached is a copy of a letter from Assistant Attorney General Colin Carl responding to the correspondence from Judge Cole to which you referred in your letter of March 30th. The Executive Letter No. 78-5 was drafted with the assistance of the Attorney General's Office, based on that office's understanding of what the court was requiring in *Sims* as indicated in Mr. Carl's letter.

Insofar as possible, staff of the Department of Human Resources is willing to work with the judges of our state district courts to resolve some of the practical problems presented by the *Sims* case. We understand the difficulties generated by the Sims decision and the department's executive letter, and we are working through the Attorney General's Office to attempt to resolve or reduce these problems.

Sincerely,

s/s

Frederick J. Biel
General Counsel

FJB:mh

Attachment

cc: Judge Criss Cole, 315th District Court
Judge Robert L. Lowry, 313th District Court
Judge W. H. Miller, 314th District Court
Judge Sam Emison, 257th District Court
Mr. Colin Carl, Assistant Attorney General
Mr. Howard Stomel, Regional Attorney

RULES OF THE 313th, 314th and 315th JUDICIAL DISTRICT COURTS OF HARRIS COUNTY, TEXAS

RULE 1

An attorney ad litem shall be appointed for a child in any suit affecting the parent-child relationship under Title 2 of the Texas Family Code in which the State is a party.

RULE 2

Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of the Texas Family Code, an officer or representative of the State shall file a petition in the court immediately after possession of the child and an emergency ex parte hearing shall be held promptly but not more than 24 hours after the child is taken into possession.

(1) When a child is taken into possession on a Friday P.M., Saturday, Sunday, or on a legal holiday which includes the P.M. of the day preceding the legal holiday, then such heaing shall be held on the first working day after the child is taken into possession. If unusual circumstances require, the court shall hold a hearing at a time and place reasonable which would serve the best interest of the child or children, or any reasonable time requested by the parents.

RULE 3

Reasonable notice of the hearing, either oral or written, shall be given stating the time, place and purpose of the emergency ex parte hearing. Such notice shall be given to the child's parents if they can be found or any other person who can reasonably be expected to know their whereabouts.

RULE 4

A date for a full adversary hearing shall be set with proper notice to the parents within ten days, measured from the date at which time Harris County Child Welfare Unit has taken possession of the child or children.

APPROVED: _____ BY: _____
Date

Judge Robert L. Lowry
313th District Court

_____
Judge W. H. Miller
314th District Court

_____
Judge Criss Cole
315th District Court

ORDER

It appears to the Courts that the Harris County Child Welfare Unit should be designated to receive and take possession of the children in Harris County under Title 2 of the Texas Family Code and be responsible for their protection.

Further, it appears that the physical presence of the children at the emergency ex parte hearing would probably cause emotional harm to the children.

It is therefore, Ordered, Adjudged and Decreed that the Harris County Child Welfare Unit is hereby designated to receive and take possession of the children in Harris County for the Courts under Title 2 of the Texas Family Code and be responsible for their protection.

It is further Ordered, Adjudged and Decreed that the Harris County Child Welfare Unit only physically deliver the children to the Courts at the time of the emergency ex parte hearing where there are extenuating circumstances.

SIGNED AND ENTERED ON THE _____day of_____, 1978.

_____
Judge Robert L. Lowry
313th District Court

_____
Judge W. H. Miller
314th District Court

_____
Judge Criss Cole
315th District Court

EXHIBIT G

March 29, 1978

Mr. Jerome Chapman
Commissioner
Texas Department of Human Resources
John Reagan Building
Austin, Texas 78711

Re: John Pleasant Sims, et
vs. Raul Jimenez, et al

Dear Mr. Chapman:

I recently received from the Attorney General's Office a copy of your Executive Letter of March 1, 1978, No. 78-5, setting out procedures for the Department of Human Resources to follow in an effort to comply with the holding in *Sims*.

At that time I made a mental note of the following language:

> "Make every reasonable effort to serve notice on the parents that *a hearing on the removal will be held within twenty-four (24) hours after removal.*"

My thoughts at the time were that the underlined portion above was a matter wholly beyond the control of the DHR representative and would soon present problems. I and my brethren on the bench are rather jealous of our prerogatives as to the setting of hearings within our courts and the above language presumes that the taking of a child into custody by the DHR representative will somehow automatically convene a district court and work a setting without consulting the court.

I cannot believe that DHR has been confronted only in our area with district judges who have explained to its representatives with more or less patience, depending upon the personality of the judge, that hearings will continue to be set by the judge and not by the day and hour of a removal. Such has now occurred in this area as reflected by the memorandum of John S. Jacobson dated March 27, 1978, a copy of which is enclosed.

I have always sought to work with the Texas Department of Human Resources recognizing their thankless task in emergency removal situations. I also early suggested my very strong reservations as to the constitutionality of Chapter 17 of the Family Code and its ". . .passing lip service to due process (if any reader would equate due process with a hearing without notice to parties in interest). . ."[1] But, even in the interest of trying to administratively shore up poor legislation, I refuse to become a night magistrate.

I suggest that *Sims* be re-examined as to the "twenty-four (24) hours rule." I find no such requirement in the Opinion except the language of the memorandum:

> "Barring unusual circumstances, the State's interest in the protection of the alleged victim of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure."

If this is the source, then it seems to me that the twenty-four (24) hour rule is an over-reaction to this language. In truth, if we are to apply the literal meaning, a child removed at 11:15 P.M. must be in court before midnight. The language permits no twenty-four-hour period apart from "the very day of seizure".

Texas statutes are replete with priority proceedings and constitutional process requiring immediate judicial attention. The best example is the right to be brought before a magistrate after arrest without warrant (Art. 14.06 C.C.P) The constitutional dimensions of the removed child and its parent situation is certainly no greater than that of the jailed adult. However, in its long history, it has never been questioned, either at the state or federal level, that the hearings to be accorded one arrested without warrant means a hearing during the regular working day of the courts. I would suggest that the three-man federal panel recognize that among the "unusual circumstances" would be removals at nights, on weekends and holidays. My feeling in this matter is reinforced by knowing two of the three judges and their less than flexible court hours.

I hope this letter is accepted in the spirit it is written. I seek to be helpful while asserting some of the few prerogatives still held by a State district judge. Maybe the "twenty-four (24) hour rule" need (sic) to be re-evaluated and the language in *Sims* re-examined.

Yours very truly,

Darrell Hester

DH:jms
Enc.
cys: As indicated on attached sheet

[1]*Emergency Protection of Children, Chapter 17, of the Family Code*, Darrell Hester; *Child Abuse and Protective Service in Texas*, State Bar, 1976.

cys to:

Mr. Fred Biel
General Counsel

Texas Department of Human Resources
John H. Reagan Building
Austin, Texas 78701

Mr. Collin J. Carl
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711

Judge John Boyd
Chairman, Judicial Section
State Bar of Texas
P.O. Box 12487, Capitol Station
Austin, Texas 78711

Mr. John S. Jacobson
Supervisor
Protective Services Unit 38
Texas Department of Human Resources
35 Orange Street
Brownsville, Texas 78520

Ms. Sonia Arredondo
Program Director for Protective Services
Texas Department of Human Resources
815 N. Closner
Edinburg, Texas 78539

Mr. Moses A. Westbrook
Regional Director for Social Services
Texas Department of Human Resources
815 N. Closner
Edinburg, Texas 78539

Mrs. Donna Justice
Regional Attorney
Texas Department of Human Resources
815 N. Closner
Edinburg, Texas 78539

MEMORANDUM

TEXAS DEPARTMENT OF HUMAN RESOURCES

SUBJECT: Emergency Removal

TO:	FROM:
Ms. Sonja Arredondo Program Director for Protective Services Edinburg 360-1	John S. Jacobson Supervisor for Protective Services Unit 38 Brownsville 046-8

DATE: March 27, 1978

On March 23, 1978 at 6:00 p.m., we had to resort to the emergency removal of the Hernandez children (ages 6, 8, 10, 11) who had been alone since 1:00 p.m. We learned that the police had been called to the home at 8:41 p.m. on the 21st by a neighbor who observed smoke coming out of the hose and found the 6-year-old had caught a rag on fire while trying to cook something. The neighbor told the police that the father always leaves his children alone. We have had a case open on this family since 10-22-75. Mr. Hernandez' physical problems, emotional insecurity and immaturity, and alcoholism result in periodic lack of supervision, physical, medical and emotional neglect.

We contacted an Uncle who refused to help and no neighbors were willing to take on the responsibility of supervision. After obtaining authorization to remove from Miss Sonja Arredondo, Program Director, we followed procedures outlined in Executive Letter 78-5 and requested the presence of a police officer when we picked up the children. Officer Eduardo Flores and a supervisor accompanied us and secured the house as much as possible since the door could not be locked. A

note was left informing Mr. Hernandez of our actions, of the hearing which would be held within 24 hours, and of the need to obtain an attorney.

On March 24, Good Friday, we attempted to have the Ex-parte hearing. I could not reach our attorney but did succeed in contacting another District Attorney who agreed to represent us. However, the judges I talked to would not agree to a hearing on a holiday, although they were quite willing to sign an emergency order. I explained that our instructions mandated us to return the children unless a 24-hour Ex-parte hearing could be held.

The children were subsequently returned before the 24 hours expired. The father had been located at 8:00 a.m. (with the smell of alcohol still very evident) and expressed his characteristic defenses and denials. When it became apparent that we would have to return the children, we finally extracted his promise that he would not leave them alone again and had him sign a statement to that effect.

We have asked the next door neighbor to call us the next time the children are left alone and will be making visits when possible, as it unlikely that they will recieve much better care on a consistent basis than before. They will undoubtedly be left alone again and run the risk of physical danger, as well as continuing to engage in delinquent behavior.

We had hoped to have the court order Mr. Hernandez to accept therapy from Tropical MH/MR and to attend Alcoholics Anonymous.

It is evident that removals from Friday afternoon through Sunday morning are no longer possible under the Department's interpretation of the Sims decision.

Copies of this memo are being sent to those people listed below, in conformance with the instructions in Executive Letter 78-5:

> "If the hearing cannot be held because the district judge or county/district/criminal district attorney cannot attend, the worker must return the child to the home and provide whatever services are possible to protect the child from death or other permanent physical harm. In these instances, the worker must inform in writing the district judge, county/district/criminal district attorney, local law enforcement officials, the regional attorney, and the regional director for social services of the child's circumstances. The danger to the child must be clearly stated."

s/s

John S. Jacobson
Supervisor

JSJ:cp

cc: Mr. Moses A. Westbrook, Reg. Dir. for Social Services, Edinburg 108-1
Ms. Dona Justus, Regional Attorney, Edinburg 108-1
Ms. Sonja Arredondo, Program Director for P.S., Edinburg 360-1
Mr. Remberto G. Arteaga, Supervisor, Unit 11, Brownsville 046-8
Brownsville Police Department, Brownsville, Tx.
Mr. Tom Sullivan, Cameron County Child Welfare Attorney, Brownsville, Tx.
Judge Filemon Vela, Cameron County District Judge, Brownsville, Tx.

Judge Darrell Hestir, Cameron County District
Judge, Brownsville, TX
Case Folder
Files

April 25, 1978

The Honorable Darrell Hester
District Judge
One Hundred Ninety Seventh
District Court
Brownsville, Texas 78520

Dear Judge Hester:

Thank you for your recent letter outlining your concerns regarding this department's interpretation of the holding in *Sims*. I appreciate and share your concerns.

The drafting of Executive Letter No. 78-5 was an undertaking that consumed a considerable amount of time, a great deal of review and numerous revisions. It represented the combined input of program staff, in-house counsel, and representatives of the Attorney General.

This department does not agree with all of the holdings in the *Sims* decision. We recognize and support judicial prerogative as to the setting of hearings in your court. However, I am sure you understand that it was necessary to send instructions to our staff concerning the Federal Court's judgment.

The discussion of the requirement for an ex parte hearing in the Executive letter which you referred to as the "24-hour rule", was developed with the assistance of the Attorney General's Office. The Amended Judgment in *Sims* reads as follows:

> 4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing

will result in a finding that the State's temporary care or protection of the child is needed.

Your analysis of the "24-hour rule" paralleled concerns of this department when it began the task of preparing the Executive Letter. It is my understanding that the interpretation that a hearing is required within twenty-four hours after removal of a child was based on the language that you cited from the opinion in *Sims*, as well as conversations with the plaintiffs' counsel and the court.

I am aware of the practical problems imposed by the *Sims* decision. These problems are reinforced by your letter to me which emphasized the problems *Sims* has created for department staff and relations with the judiciary. With these problems in mind, the department is appealing part of the decision regarding the twenty-four hour hearing and we are working with the Attorney General's Office to determine what other remedies may be available. To date, our Motion to Stay the Judgment in *Sims* pending appeal, has been denied.

Although we recognize Executive Letter No. 78-5 and the *Sims* decision have placed staff in a difficult position, we are attempting to resolve the problems. I hope that, insofar as possible, the problems can be resolved.

Sincerely,

s/s

Jerome Chapman

JC:jbm

bcc: Colin Carl

EXHIBIT H

April 14, 1978

Mr. Bernie Lopez
Program Director
Texas Department of Human Resources
Box 3700
Amarillo, Texas 79106

Re: *Sims* Case Compliance

Dear Bernie:

The five District Judges, who operate in Potter, Randall and Armstrong Counties, have studied the effect of the Sims decision on the cases filed by the Texas Department of Human Resources. Our own conclusion as to the correct interpretation has been reinforced by a legal opinion we requested from the County Attorney and by a presentation at the West Texas Judicial Conference in Lubbock, Texas.

It is our intention to fully comply with Sims, (sic) which we feel can be accomplished by extending an initial hearing within twenty-four hours or on the next working day. As you know, Sims (sic) deals basically with a due process problem, and although the Federal Courts have written hundreds of decisions concerning the right to notice and hearing, none of these decisions has ever required hearings on weekends or holidays.

It is the hope of the Judges that your knowing our interpretation will be of assistance in our working together efficiently. By copy of this letter, I am informing Mr. Chapman of our conclusions since it appears that his current Executive Letter goes beyond the requirements as we interpret them.

Yours truly,

s/s

Jerry Shackelford

JS/lm

cc.(sic)
Mr. Jerome Chapman
Commissioner
State Office
Texas Department of Human Resources
Austin, Texas

Mr. George Harwood
Assistant County Attorney
Potter County Courthouse
Amarillo, Texas 79101

March 20, 1978

The Honorable Edward Nobles
Presiding Judge
108th District Court
Potter County Courthouse
Amarillo, Texas

The Honorable H. Bryan Poff
Presiding Judge
47th District Court
Potter County Courthouse
Amarillo, Texas

The Honorable Naomi Harney
Presiding Judge
251st District Court
Potter County Courthouse
Amarillo, Texas

The Honorable George E. Dowlen
Presiding Judge
181st District Court
Potter County Courthouse
Amarillo, Texas

The Honorable Jerry Shackleford
Presiding Judge
320th District Court
Potter County Courthouse
Amarillo, Texas

Re: Sims vs. State Department of Public Welfare, Civil Action No. 76-H-665 in the United States District Court for the Southern District of Texas

TO: The Presiding Judges of District Courts sitting in Potter County Texas:

This is to apprise you of the opinion of this office regarding the appropriate construction of "immediately" in the context of the judgment in the above referenced cause.

This judgment declares, inter alia, that Section 17.02 of the Texas Family Code is unconstitutional insofar as it fails to require that a temporary disposition hearing be held "immediately" after possession of the child is taken by the state. Thus, whether our procedure in

actions brought under Chapter 17 T.F.C. comply with this directive of the Court turns upon the time frame intended to be delimited by "immediately".

In the absence of any expression of intent attendent to the use of the term "immediately", clearly it can properly be construed as equivalent to phraseology such as "with due diligence", "as soon as practicable," and "within a reasonable time in light of the circumstances involved." See e.g. *McPherson v. St. Paul Fire and Marine Insurance Company* 350 F 2d 563 (5th Cir. 1965) and *National Surety Corporation v. Wells* 287 F 2d 102 (5th Cir. 1961).

The Court's mandate that a hearing pertaining to a child taken into possession pursuant to Section 17.01 T.F.C. be effected immediately after possession can be equated with the requirements of the motor (sic) Vehicle Statutes (Article 6701 d V.A.C.S.) that one arrested be immediately presented before a magistrate. The Texas Supreme Court has declined to apply the literal or strict interpretation of the term "immediately," as evidenced by its opinion in *Hicks v. Matthews* 266 SW 2d 846 (Tex. S.Ct. 1959), wherein it is reasoned at page 849 that

> "The word 'immediately' is a term of relative signification. Sometimes it is understood to mean instantaneously or without intervention of time, but, as used in most statutes, it is not to be construed so strictly. The law must be given a practical and reasonable application. Accordingly, the word 'immediately' is very generally held to mean with due diligence. The accused has the right to be presented without delay, but the question of what is delay must be determined by all the facts and circumstances. Necessarily some time must elapse between the arrest and the presentment before the magistrate."

It is noteworthy that in amending Article 14.06 of the Code of Criminal Procedure, which requires the arresting officer to present the accused before a magistrate, the legislature supplanted "immediately" with "without unnecessary delay".

It is therefore our opinion that, in the context of Section 17.02 T.F.C. "immediately" requires that a temporary disposition hearing pertaining to the child seized be afforded on the day of seizure, or if the child is taken after working hours, on the first working day following the seizure.

The foregoing must be qualified by the observation that the Court expressly stated in its opinion at page 26 that "the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure." However, we feel that the Court simply overlooked the fact that children may be taken into possession pursuant to Section 17.01 T.F.C. on Friday evening, Saturday or Sunday. That the *Sims* Court would require a convening of the District Court prior to the next working day stretches credulity beyond reason; surely the Court could not have intended to require an even more expeditious presentation of children for a temprrary (sic) disposition hearing than would be applicable to one accused of a crime, since the deprivation of right can be deemed no greater. The *Sims* case has been appealed directly to the United States Supreme Court, and hopefully the ambiguity of the District Court's opinion, and its incongruity with pre-existing law and precepts of reasonable statutory construction will be resolved.

If we can be of assistance in this or in any other matter please call on us at any time.

Very truly yours,

s/s
JOHN L. OWEN
Assistant County Attorney

APPROVED BY:

s/s
KERRY KNORPP
County Attorney

JLO:kk

May 10, 1978

The Honorable Jerry Shackleford
320th Judicial District of Texas
309 Courthouse
Amarillo, Texas 79101

Dear Judge Shackleford:

I have received a copy of your letter to Mr. Bernie Lopez outlining your concerns regarding this department's interpretation of the holding in *Sims*. I appreciate and share your concerns.

The drafting of Executive Letter No. 78-5 was an undertaking that consumed a considerable amount of time and involved a great deal of review. It represented the combined input of program staff, in-house counsel, and representatives of the Attorney General.

This department does not agree with all of the holdings in the *Sims* decision. We recognize and support judicial prerogative as to the setting of hearings in your court. However, I am sure you understand that it was necessary to send instructions to our staff concerning the Federal Court's judgment.

The discussion of the requirement for an ex parte hearing within 24 hours was developed with the assistance of the Attorney General's Office. The Amended Judgment in *Sims* reads as follows:

> 4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's

temporary care or protection of the child is needed.

Your analysis of the requirement for an immediate hearing paralleled concerns of this department when it began the task of preparing the Executive Letter. It is my understanding that the interpretation that a hearing is required within twenty-four hours after removal of a child was based on language from the court's opinion in *Sims*, which the Potter County Attorney referred to as qualifying his own legal opinion on page 3, as well as conversations with the plaintiffs' counsel and the court.

I am aware of the practical problems imposed by the *Sims* decision. These problems are reinforced by your letter to me which emphasized the problems *Sims* has created for department staff and relations with the judiciary. With these problems in mind, the department is appealing part of the decision regarding the twenty-four hour hearing and we are working with the Attorney General's Office to determine what other remedies may be available. To date, our Motion to Stay the Judgment in *Sims* pending appeal, has been denied.

Although we recognize Executive Letter No. 78-5 and the *Sims* decision have placed staff in a difficult position, we are attempting to resolve the problems. I hope that, insofar as possible, the problems can be resolved.

Sincerely,

Jerome Chapman

JC:fjb

bcc: Frederick J. Biel, 170-0
Natalyn Collins, 217-7
Colin J. Carl
Bernie Lopez

EXHIBIT I

M E M O R A N D U M

TEXAS DEPARTMENT OF HUMAN RESOURCES

SUBJECT: Attached Court Order

TO:	FROM:
Ms. Mary S. Barrett	Wayne Hairgrove
Program Manager	Lead Program Director
Children's Services	Protective Services
Arlington 012-5	Fort Worth 128-7

DATE: May 25, 1978

I have attached for your information a copy of the court order that I have just received from Judge Scott Moore, our Juvenile Judge in Tarrant County. You will see from reading the order that he has ordered us to hold in our custody any child removed under Chapter 17 from 2:00 p.m. on Friday to 1:00 p.m. on Monday, until an emergency hearing has been held. You will also see that he has made an exception for those children that we determine can be safely returned to their parent or custodian.

I am making a copy of this memorandum and this order available to Mike Poston, our Acting Regional Attorney, because I believe that a copy of this order should be sent to our Legal Division in State Office. If you have any questions about this order, please feel free to contact me.

s/s

Wayne Hairgrove

WH:gg

cc: Mr. J.W. Keith, 012-5
Mr. Lawrence G. Anderson, 012-5
Ms. Bobbie Mae Matthews, 535-0
Ms. Kaye Love, 530-0
Ms. Cynthia McKenzie, 098-1
Mr. Mike Poston, 128-9
Ms. Helen Grape, 128-9
Ms. Nancy Graham, 128-9
Ms. Allene Margowski, 128-3

Attachment

IN THE JUVENILE COURT

OF TARRANT COUNTY, TEXAS

O R D E R

Effective immediately, Wayne Hairgrove, Lead Program Director for the Tarrant County Child Welfare Unit of the State Department of Human Resources, and his agents and employees are ordered to hold in their custody any child removed by authority of the provisions of Chapter Seventeen of the Texas Family Code between the hours of 2 p.m. Friday and 1 p.m. Monday until an emergency hearing has been held except for those children that the Child Welfare Unit determines can be safely returned prior to the emergency hearing to the parent or custodian from whom they were removed.

Signed this *1st* day of *May*, 1978.

s/s

JUDGE SCOTT MOORE

EXHIBIT J

31 May 1978

Jerome Chapman, Commissioner
Texas Department of Human Resources
John H. Reagan Building
Austin, Texas 78701

Dear Commissioner:

On May 25th, I, Judge Decker of the 122nd District Court and Judge Morgan of the 212th District Court met with Mr. Lloyd E. Davis, Department of Human Resources Program Director for Galveston County Children's Protective Services and Mr. Pete Urbani, Jr., Vice-Chairman of the aforementioned agency's Board, to discuss local procedures following the Sims (sic) Judgment (Amended). Of greatest concern was the interpretation of holding and *"ex parte* presentation to a judicial authority beyond the very day of seizure (of a child)".

After much discussion, it was the feeling of the District Judges that the following procedures will be adopted by this County and will adequately follow the Sims case:

a) If a child is taken into custody prior to 5 P.M. on any working Friday and if the Protective Services agency is confronted by the child's parents before 5 P.M., a District Judge will have an *ex parte* hearing at that time, otherwise a District Judge will make himself available for an *ex parte* hearing on the following working day.

b) If a child is taken into custody after working hours or during a weekend or holiday and the parents strenuously demand the return of their child, an *ex parte* hearing will be held if a District Judge can be contacted.

c) We do not only agree that it is unnecessary for a District Judge to be "on call" for these *ex parte* hearings but further advised Mr. Davis and Mr. Urbani that it would not be wise for a staff member to return a child to a dangerous situation after the passage of 24 hours.

On a closing note, we strongly feel that any applicable law arising out of the Sims case is better left with the jurisdiction of the District Courts rather than in the hands of individuals.

Very truly yours,

_____

Judge-56th Judicial District

HG/jm

cc: The Honorable William Decker
Judge 122nd District Court
Galveston County Courthouse
Galveston, Texas 77550

The Honorable Don Morgan
Judge 212th District Court
Galveston County Courthouse
Galveston, Texas 77550

The Honorable Ed Harris
Judge 10th District Court
Galveston County Courthouse
Galveston, Texas 77550

C.J. Carl, Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

APPENDIX I

APPLICABLE PROVISIONS OF TEXAS FAMILY CODE

CHAPTER 11
CHAPTER 14
CHAPTER 15
CHAPTER 17
CHAPTER 34
CHAPTER 35

CHAPTER 11. GENERAL PROVISIONS

Section 11.01. Definitions
Section 11.02. Suit Authorized; Scope of Suit
Section 11.03 Who May Bring Suit
Section 11.04. Venue
Section 11.05. Continuing Jurisdiction
Section 11.051. Acquiring Jurisdiction Over Nonresident
Section 11.06. Transfer of Proceedings
Section 11.07. Commencement of Suit and Petition for Further Remedy
Section 11.071. Identification of Court of Continuing Jurisdiction
Section 11.08 Contents of Petition
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Section 11.12. Social Study
Section 11.13. Jury
Section 11.14. Hearing
Section 11.15. Findings
Section 11.16. Copies of Decree
Section 11.17. Central Record File
Section 11.18. Costs
Section 11.19. Appeal
Section 11.20. Representation of Department

Section 11.01. Definitions. As used in this Subtitle and Subtitle C of this title, unless the context requires a different definition:

(1) *Child or minor* means a person under 18 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. *Adult* means any other person.

(2) *Court* means the district court, court of domestic relations, juvenile court having the jurisdiction of a district court, or other court expressly given jurisdiction of a suit under this subtitle.

(3) *Parent* means the mother, a man as to whom the child is legitimate, or an adoptive mother or father, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) *Parent-child relationship* means the rights, privileges, duties and powers existing between a parent and child as provided by Section 12.04 of this code.

(5) *Suit affecting the parent-child relationship* means a suit brought under this subtitle in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought.

(6) *Managing conservatorship* means the relationship between a child and a managing conservator appointed by court order or designated in an affidavit of relinquishment under this subtitle.

(7) *Authorized agency* means a public social agency authorized to care for children or to place children for adoption, or a private association, corporation, or person approved for that purpose by the State Department of Public Welfare through a license, certification, or other means.

(8) *Illegitimate child* means a child who is not and has never been the legitimate child of a man and whose parent-child relationship with its natural mother has not been terminated by a court decree.

Section 11.02. Suit Authorized; Scope of Suit. (a) A suit affecting the parent-child relationship may be brought as provided in this subtitle.

(b) One or more matters covered by this subtitle may be determined in the suit. The court, on its own motion, may require the parties to replead in order that any issue affecting the parent-child relationship may be determined in the suit.

Section 11.03. Who May Bring Suit. A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency.

Section 11.04. Venue. (a) Except as otherwise provided in this subtitle, a suit affecting the parent-child relationship shall be brought in the county where the child resides.

(b) A suit in which adoption is sought may be brought in the county where the child resides, the petitioners reside, or if the child is placed for adoption by an authorized agency, in the county where the authorized agency is located.

(c) A child resides in the county where his parents (or parent if only one parent is living) reside, except that:

(1) if a managing conservator has been appointed by court order or designated in an affidavit of relinquishment, or if a custodian for the child has been appointed by order of a court before January 1, 1974, the child resides in the county where the managing conservator or custodian resides;

(2) if a guardian of the person has been appointed by order of a county or probate court and a managing

conservator has not been appointed, the child resides in the county where the guardian of the person resides;

(3) if the parents of the child do not reside in the same county and neither a managing conservator nor a guardian of the person has been appointed, the child resides in the county where the parent having care and control of the child resides;

(4) if the child is under the care and control of an adult other than a parent and (A) neither a managing conservator nor a guardian of the person has been appointed or (B) the whereabouts of the managing conservator or the guardian of the person is unknown or (C) the person whose residence determines the residence of the child under this section has left the child under the care and control of the adult, the child resides where the adult having care and control of the child resides;

(5) if a guardian or custodian of the child has been appointed by order of a court of another state or nation, the child resides in the county where the guardian or custodian resides; or

(6) if it appears that the child is not under the care and control of an adult, the child resides where he is found.

Section 11.05. Continuing Jurisdiction. (a) Except as provided in Subsections (b), (c), and (d) of this section, when a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing jurisdiction of all matters provided for under this subtitle in connection with the child, and no other court has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in Section 11.06 of this code.

(b) A final decree of adoption ends a court's continuing jurisdiction over the child, and any subsequent suit affecting the child shall be commenced as though the child had not been the subject of a suit for adoption or any other suit affecting the parent-child relationship prior to the adoption.

(c) A court shall have jurisdiction over a suit affecting the parent-child relationship if it has been, correctly or incorrectly, informed by the State Department of Public Welfare that the child has not been the subject of a suit affecting the parent-child relationship and the petition states that no other court has continuing jurisdiction over the child.

(d) (1) In a suit in which a determination of paternity is sought, except as provided in paragraph (2), the jurisdiction of the court terminates when an order dismissing with prejudice a suit under Chapter 13 becomes final, or when an order under Subsection (b), Section 13.08, declaring that the alleged father is not the father of the child becomes final, or when an order denying voluntary legitimation under Section 13.10 becomes final.

(2) The jurisdiction of the court does not terminate if the child was subject to the jurisdiction of the court or some other court in a suit affecting the parent-child relationship prior to the commencement of the suit to determine paternity.

Section 11.051. Acquiring Jurisdiction Over Nonresident. In a suit affecting the parent-child relationship, the court may exercise personal jurisdiction over a person on whom service of citation is required or over the person's personal representative, although the person is not a resident of domiciliary of this state, if:

(1) the child was conceived in this state and the person on whom service is required is a parent or an alleged or probable father of the child;

(2) the child resides in this state, as defined by Section 11.04 of this code, as a result of the acts or directives or with the approval of the person on whom service is required;

(3) the person on whom service is required has resided with the child in this state; or

(4) notwithstanding Subdivisions (1), (2), or (3) above, there is any basis consistent with the constitutions of this state or the United States for the exercise of the personal jurisdiction.

Section 11.06. Transfer of Proceedings. (a) If venue is improperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

(b) If a petition or a motion to modify a decree is filed in a court having continuing jurisdiction of the suit, the court, on the timely motion of any party, and on a showing that venue is proper in another county or that a suit for dissolution of marriage has been filed in another court, shall transfer the proceeding to the county where venue is proper or to the court where the suit for dissolution of the marriage is pending. However, if the basis of the motion is that the child resides in another county, the court may deny the motion if it is shown that the child has not resided in that county for at least six months. In computing the period of time during which the child has resided in that county, the court shall not

require that the period of residence be continuous and uninterrupted but shall look to the child's principal residence during the said six-months period.

(c) For the convenience of the parties and witnesses and in the interest of justice, the court, on the timely motion of any party, may transfer the proceeding to a proper court in any other county in the state.

(d) If a court has continuing jurisdiction over a child but another court has acquired jurisdiction over the child in a suit affecting the parent-child relationship under Section 11.05(c) of this code, the court previously having jurisdiction over the child, on a motion of any party or on the court's motion, shall transfer the proceeding to the court which has acquired jurisdiction under Section 11.05(c) of this code.

(e) A motion under Subsection (a), (b), or (c) of this section must be made on or before the day on which answer is required.

(f) Each party to the suit is entitled to 10 days' notice and a hearing on the transfer which shall be held within 30 days after the day of filing the motion to transfer. Only evidence pertaining to venue shall be taken at the hearing. An order transferring or refusing to transfer the proceeding is not appealable.

(g) The court transferring a proceeding shall send to the proper court in the county to which transfer is made the complete files in all matters affecting the child, certified copies of all entries in the minutes, and a certified copy of any decree of dissolution of marriage issued in a suit joined with the suit affecting the parent-child relationship. If the transferring court retains jurisdiction of another child who was the subject of the suit, the court shall send a copy of the complete files to the court to which the transfer is made and shall keep the original files.

(h) A court to which a transfer is made becomes the court of continuing jurisdiction, and all proceedings in the suit are continued as if it were brought there originally.

Section 11.07. Commencement of Suit and Petition for Further Remedy. (a) A suit affecting the parent-child relationship shall be commenced by the filing of a petition as provided in this chapter.

(b) Except in a motion to modify as provided in Section 14.08 of this code, a request for further action concerning a child who is the subject of a suit affecting the parent-child relationship and who is under the jurisdiction of a court with continuing jurisdiction shall be initiated by the filing of a petition as provided in this chapter.

(c) On the receipt of a petition requesting further action concerning the child in the court of continuing jurisdiction, the clerk shall file the petition and all other papers relating to the request for further action in the file of the suit affecting the parent-child relationship under the same docket number as the prior proceeding.

Section 11.071. Identification of Court of Continuing Jurisdiction. (a) The petitioner or the Court shall request from the State Department of Public Welfare identification of the court that last had jurisdiction of the child in a suit affecting the parent-child relationship unless:

(1) the petition alleges that no court has continuing jurisdiction of the child, and the issue is not disputed by the pleadings; or

(2) the petition alleges that the court in which the suit, petition for further remedy, or motion to modify has been filed has acquired and retains continuing

jurisdiction of the child as the result of a prior proceeding, and the issue is not disputed by the pleadings.

(b) The department shall, on the written request of the court, an attorney, or any party, identify the court that last had jurisdiction of the child in a suit affecting the parent-child relationship and give the docket number of the suit, or state that the child has not been the subject of a suit affecting the parent-child relationship. The child shall be identified in the request by name, birthdate, and place of birth. The department shall transmit this information within 10 days after the day the request is received.

(c) If a request for information from the department relating to the identity of the court having continuing jurisdiction of the child has been made pursuant to Subection (a), no final order, except an order of dismissal, shall be entered until the information is filed with the court. If a final order is entered in the absence of the filing of the information from the department, the order is voidable on a showing that a court other than the court that entered the order had continuing jurisdiction.

(d) If the court in which a petition in a suit affecting the parent-child relationship is filed determines that another court has continuing jurisdiction of the child, the court in which the petition is filed shall dismiss the suit without prejudice.

Section 11.08. Contents of Petition. (a) The petition and all other documents in the proceeding brought under this subtitle (except a suit for adoption of an adult) shall be entitled *In the interest of* _____, *a child.* In a suit in which adoption of a child is sought, the style shall be, *In the interest of a child.*

(b) The petition must include:

(1) a statement that the court in which the petition is filed has continuing jurisdiction or that no court has continuing jurisdiction of the suit;

(2) the name, sex, place and date of birth, and place of residence of the child, except that if adoption of a child is sought, the name of the child may be omitted;

(3) the full name, age, and place of residence of the petitioner and his relationship to the child or the fact that no relationship exists;

(4) the names, ages, and place of residence of the parents, except in a suit in which adoption is sought;

(5) the name and place of residence of the managing conservator, if any, or the child's custodian, if any, appointed by an order of the court before January 1, 1974, or by order of a court of another state or nation;

(6) the names and places of residence of the guardians of the person and estate of the child, if any;

(7) the names and places of residence of possessory conservators or other persons, if any, having access to the child under an order of the court;

(8) in a suit in which termination of the parent-child relationship between an illegitimate child and its mother is sought, the name and place of residence of the alleged father or probable father of the child or a statement that the identity of the father of the child is unknown;

(9) a full description and statement of value of all property owned or possessed by the child;

(10) a statement describing what action the court is requested to make concerning the child and the statutory grounds on which the request is made; and

(11) any other information required by other provisions of this subtitle.

(c) The petition and other matters in a suit in which a determination of paternity is sought, if the petitioner is a person other than the alleged father of the child, are confidential, and the district clerk and employees of the clerk may not disclose to any person other than the court, the department, or a party to the suit any matter concerning the suit. This subsection does not apply if and when the suit is set for trial under Subsection (b) of Section 13.05 of this code.

Section 11.09. Citation and Notice. (a) Except as provided in Subsection (b) of this section, the following persons are entitled to service of citation on the filing of a petition in a suit affecting the parent-child relationship:

(1) the managing conservator, if any;

(2) possessory conservators, if any;

(3) persons, if any, having access to the child under an order of the court;

(4) persons, if any required by law or by order of a court to provide for the support of a child;

(5) the guardian of the person of the child, if any;

(6) the guardian of the estate of the child, if any;

(7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Section 15.03(c)(2) of this code;

(8) in a suit in which termination of the parent-child relationship between an illegitimate child and its mother is sought, the alleged father or probable father, unless there is attached to the petition an affidavit of

waiver of interest in a child executed by the alleged father or probable father as provided in Section 15.041 of this code or unless the petition states that the identity of the father is unknown; and

(9) in a suit to determine the paternity of a child, the alleged father, unless the alleged father is a petitioner.

(b) Service of citation may be given to any other person who has or who may assert an interest in the child and may be given to the unknown father of an illegitimate child.

(c) (i) Except in a suit in which termination of the parent-child relationship is sought, citation on the filing of a petition in a suit affecting the parent-child relationship or notice of a hearing shall be issued and served as in other civil cases except that citation or notice may be given by registered or certified mail, return receipt requested. In such cases, the clerk shall mail the citation and a copy of the petition to the person so notified marked for delivery to the addressee only. The filing of the returned receipt indicating delivery by registered or certified mail to the proper person shall be sufficient proof of the fact of service.

(ii) In a suit in which termination of the parent-child relationship is sought, citation on the filing of a petition or notice of a hearing shall be issued and served as in other civil cases.

(d) Citation may be given by publication as in other civil cases to persons entitled to service of citation who cannot be notified by personal service or registered or certified mail and to persons whose names are unknown. The notice shall be published one time. If the name of a person entitled to service of citation is unknown, the notice to be published shall be addressed to "All Whom It May Concern." One or more causes to be heard on a

certain day may be included in one notice and hearings may be continued from time to time without further notice.

(e) Notice by publication shall be sufficient if given in substantially the following form:

"STATE OF TEXAS

To (names of persons to be served with citation), and to all whom it may concern (if the name of any person to be served with citation is unknown), Respondent(s),

GREETINGS:

"YOU ARE HEREBY COMMANDED to appear and answer before the Honorable District Court, _____Judicial District, _____ County, Texas, at the Courthouse of said county in _____, Texas, at or before 10 o'clock a.m. of the Monday next after the expiration of 20 days from the date of service of this citation, then and there to answer the petition of _____, Petitioner, filed in said Court on the ___ day of _____, 19___, against _____, Respondent(s), and said suit being number _____ on the docket of said Court, and entitled 'In the interest of _____, a child,' the nature of which suit is a request to (statement of relief sought, e.g., 'terminate the parent-child relationship'). Said child was born the ___ day of _____, 19___, in (place of birth).

"The court has authority in this suit to enter any judgment or decree in the child's interest which will be binding upon you, including the termination of the parent-child relationship, the determination of paternity and the appointment of a conservator with authority to consent to the child's adoption.

"Issued and given under my hand and seal of said Court at _____, Texas, this the ___ day of _____, 19___.

.....

Clerk of the District Court of
_____ County, Texas.

By _____, Deputy."

Section 11.10. Guardian Ad Litem. (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney ad litem has been appointed for the child or unless the court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party. In any other suit under this subtitle, the court may appoint a guardian ad litem. The managing conservator may be appointed guardian ad litem if he is not a parent of the child or a person petitioning for adoption of the child and if he has no personal interest in the suit.

(b) A guardian ad litem shall be appointed to represent any other person entitled to service of citation under the provisions of Section 11.09 of this code if the person is incompetent or a child, unless the person has executed an affidavit of relinquishment of parental rights or an affidavit of waiver of interest in child containing a waiver of service of citation.

(c) The court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the suit.

Section 11.11. Temporary Orders. (a) In a suit affecting the parent-child relationship, the court may

make any temporary order for the safety and welfare of the child, including but not limited to an order:

(1) for the temporary conservatorship of the child;

(2) for the temporary support of the child;

(3) restraining any party from molesting or disturbing the peace of the child or another party;

(4) taking the child into the possession of the court or of a person designated by the court; or

(5) attaching the body of the child or prohibiting a person from removing the child beyond the jurisdiction of the court as under a writ of ne exeat.

(b) Temporary orders under this section are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally.

(c) In a suit under this subtitle the court may dispense with the necessity of a bond in connection with temporary orders in behalf of the child.

Section 11.12. Social Study. (a) In a suit affecting the parent-child relationship, the court may order the preparation of a social study into the circumstances and condition of the child and of the home of any person seeking managing conservatorship or possession of the child.

(b) The social study may be made by any state agency, including the State Department of Public Welfare, or any private agency, or any person appointed by the court. If an authorized agency is the managing conservator, the social study shall be made by the authorized agency. The social study shall be made according to criteria established by the court.

(c) The agency or person making the social study shall file its findings and conclusions with the court on a date set by the court. The report shall be made a part of the record of the suit; however, the disclosure of its contents to the jury is subject to the rules of evidence.

Section 11.13. Jury. (a) In a suit affecting the parent-child relationship, except a suit in which adoption is sought, any party may demand a jury trial.

(b) The court may not enter a decree that contravenes the verdict of the jury, except with respect to the issues of the specific terms and conditions of access to the child, support of the child, and the rights, privileges, duties, and powers of conservators, on which issues the verdict, if any, is advisory only.

Section 11.14. Hearing. (a) Except as otherwise provided in this subtitle, proceedings shall be as in civil cases generally.

(b) On the agreement of all parties to the suit, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.

(c) The court may compel the attendance of witnesses necessary for the proper disposition of the petition, including a representative of the agency making the social study, who may be compelled to testify.

(d) A record shall be made as in civil cases generally unless waived by the parties with the consent of the court.

(e) The rules of evidence apply as in other civil cases.

(f) When information contained in a report, study, or examination is before the court, the person making the report, study, or examination is subject to both direct

examination and cross-examination as in civil cases generally.

(g) The hearing may be adjourned from time to time.

Section 11.15. Findings. The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

Section 11.16. Copies of Decree. Copies of a decree of termination or adoption issued under Section 15.05 or Section 16.08 of this code are not required to be mailed to parties as provided in Rules 119a and 239a, Texas Rules of Civil Procedure.

Section 11.17. Central Record File. (a) Except as provided by Subsection (b) of this section, the clerk of each court having jurisdiction of suits affecting the parent-child relationship shall transmit to the State Department of Public Welfare a copy of the decree entered in each suit affecting the parent-child relationship, together with the name and all prior names, birthdate, and place of birth of the child. The department shall maintain these records in a central file according to the name, birthdate, and place of birth of the child, the court which rendered the decree, and docket number of the suit.

(b) On entry of a decree of adoption or on the termination of jurisdiction of a court as provided in Section 11.05(d) of this code, the clerk of the court at petitioner's request shall transmit to the department a complete file in the case, including all pleadings, papers, studies, and records in the suit other than the minutes of the court. The clerk of the court, on entry of a decree of adoption, shall send to the department a certified copy of the petition and decree of adoption. The clerk may not transmit to the department pleadings, papers, studies, and records relating to a suit for divorce

or annulment or to declare a marriage void. When the department receives the complete file or petition and decree of adoption, it shall close the records concerning that child; and except for statistical purposes, it shall not disclose any information concerning the prior proceedings affecting the child. Except as provided in Subsection (d) of this section, any subsequent inquiries concerning the child shall be handled as though the child had not been previously the subject of a suit affecting the parent-child relationship. On the receipt of additional records concerning a child who has been the subject of a suit affecting the parent-child relationship in which the records have been closed as required in this section, a new file shall be made and maintained as other records required by this section.

(c) The department may charge a reasonable fee to cover the cost of determining and sending information concerning the identity of courts with continuing jurisdiction. The receipts shall be deposited in any financial institution as determined by the commissioner of welfare and withdrawn as necessary for the sole purpose of operating and maintaining the central record file.

(d) The records concerning a child maintained by the district clerk after entry of a decree of adoption, and all the records required to be maintained by the department are confidential, and no person is entitled to access to or information from these records except as provided by this information from these records except as provided by this subtitle or on an order of the court which issued the decree of a district court of Travis County for good cause.

(e) The department may utilize microfilm or other suitable means for maintaining the central record file. A certified reproduction of a document maintained by

the department is admissible in evidence as the original document.

(f) The court, on the motion of a party or on the court's own motion, may order the sealing of the file, the minutes of the court, or both, in a proceeding in which adoption or termination was sought. This subsection does not relieve the clerk from the duty to transmit files or petitions and decrees of adoption to the department as required by Subsection (b) of this section.

Section 11.18. Costs. (a) In any proceeding under this subtitle, the court may award costs as in other civil cases. Reasonable attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order for fees in his own name.

(b) No separate filing fee is required in any suit affecting the parent-child relationship joined with a suit for dissolution of marriage under Title 1 of this code. Additional filing fees shall not be required if more than one form of relief is requested in a suit affecting the parent-child relationship.

Section 11.19. Appeal. (a) Appeals from orders, decrees, or judgments entered in suits affecting the parent-child relationship, when allowed under this section or under other provisions of law, shall be as in civil cases generally.

(b) An appeal may be taken by any party to a suit affecting the parent-child relationship from an order, decree, or judgment:

(1) entered under Chapter 13 of this code;

(2) entered under Chapter 14 of this code appointing or refusing to appoint a managing conservator; appointing or refusing to appoint a possessory

conservator; ordering or refusing to order payments for support of a child; or modifying any such order previously entered;

(3) entered under Chapter 15 of this code terminating or refusing to terminate the parent-child relationship; or appointing a managing conservator;

(4) entered under Chapter 16 of this code granting or refusing an adoption.

(c) An appeal from an order, judgment, or decree, with or without a supersedeas bond, does not suspend the order, decree, or judgment unless suspension is ordered by the court entering the order, decree, or judgment. The appellate court, on a proper showing, may permit the order, decree, or judgment to be suspended.

(d) On the motion of the parties or on its own motion the appellate court in its opinion may identify the parties by fictitious names or by their initials only.

Section 11.20. Representation of Department. In any suit brought under subtitle A or C of this title in which the State Department of Public Welfare is a party, the department shall be represented in the trial court by the prosecuting attorney who represents the state in criminal cases in the district or county court of the county where the suit is filed or transferred or by the attorney general.

CHAPTER 14. CONSERVATORSHIP, POSSESSION, AND SUPPORT OF CHILDREN

Section 14.01. Court Appointment of Managing Conservator
Section 14.02. Rights, Privileges, Duties, and Powers of Managing Conservator
Section 14.03. Possession of and Access to Child
Section 14.04. Rights, Privileges, Duties, and Powers of Possessory Conservator
Section 14.05. Support of Child
Section 14.06. Agreements Concerning Conservatorship
Section 14.07. Best Interest of Child
Section 14.08. Modification of Order
Section 14.09. Enforcement of Order
Section 14.10. Habeas Corpus

Section 14.01. Court Appointment of Managing Conservator. (a) In any suit affecting the parent-child relationship, the court may appoint a managing conservator, who must be a suitable, competent adult, or a parent, or an authorized agency. If the court finds that the parents are or will be separated, the court shall appoint a managing conservator.

(b) A parent shall be appointed managing conservator of the child unless the court finds that appointment of the parent would not be in the best interest of the child. In determining which parent to appoint as managing conservator, the court shall consider the qualifications of the respective parents without regard to the sex of the parent.

(c) A qualified person or authorized agency designated managing conservator of the child in an unrevoked or irrevocable affidavit or relinquishment of parental rights executed pursuant to Section 15.03 of this code shall be appointed managing conservator of the child unless the court finds that appointment of the person or agency would not be in the best interest of the child.

(d) A person appointed managing conservator who is not a parent of the child shall each 12 months after his appointment file with the court a report of facts concerning the child's welfare, including his whereabouts and physical condition. The report may not be admitted in evidence in any subsequent suit affecting the parent-child relationship.

Section 14.02. Rights, Privileges, Duties, and Powers of Managing Conservator. (a) Except as provided in Subsection (d) of this section, a parent appointed managing conservator of the child retains all the rights, privileges, duties, and powers of a parent to the exclusion of the other parent, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child.

(b) A managing conservator who is not the parent of the child has the following rights, privileges, duties, and powers, subject to the rights, privileges, duties, and powers of a possessory conservator as provided in Section 14.04 of this code and to any limitation imposed by court order in allowing access to the child:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and

religious training, and reasonable discipline of the child;

(3) the duty to provide the child with clothing, food, shelter, and education;

(4) the right to the services and earnings of the child;

(5) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(6) the power to represent the child in legal action and to make other decisions of substatial legal significance concerning the child;

(7) the power to receive and give receipt for periodic payments for the support of the child and to hold or disburse these funds for the benefit of the child; and

(8) if the parent-child relationship has been terminated with respect to the parents, or only living parent, or if there is no living parent, the power to consent to the adoption of the child and to make any other decision concerning the child that a parent could make.

(c) A person or authorized agency designated managing conservator of a child in an affidavit of relinquishment executed pursuant to Section 15.03 of this code shall have the rights, privileges, duties, and powers given by Section 14.04 of this code to a possessory conservator until such time as these rights, privileges, duties, and powers are modified or terminated by court order.

(d) The appointment of a managing conservator does not create, rescind, or otherwise alter a right to inherit as established by law or as modified under Chapter 15 of this code.

Section 14.03. Possession of and Access to Child. (a) If a managing conservator is appointed, the court may appoint one or more possessory conservators and set the time and conditions for possession of or access to the child by the possessory conservators and others.

(b) On the appointment of a possessory conservator, the court shall prescribe the rights, privileges, duties, and powers of the possessory conservator.

(c) The court may not deny possession of or access to a child to either or both parents unless it finds that parental possession or access is not in the best interest of the child and that parental possession or access would endanger the physical or emotional welfare of the child.

(d) If the court finds that it is in the best interests of the child as provided in Section 14.07 of this code, the court may grant reasonable access rights to either the maternal or paternal grandparents of the child; and to either the natural maternal or paternal grandparents of a child whose parent-child relationship has been terminated or who has been adopted before or after the effective date of this code. Such relief shall not be granted unless one of the child's legal parents at the time the relief is requested is the child's natural parent. The court may issue any necessary orders to enforce said decree.

Section 14.04. Rights, Privileges, Duties, and Powers of Possessory Conservator. A possessory conservator has the following rights, privileges, duties, and powers during the period of possession, subject to any limitations expressed in the decree:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to provide the child with clothing, food, and shelter;

(3) the power to consent to medical and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

(4) any other right, privilege, duty, or power of a managing conservator expressly granted in the decree awarding possession of the child.

Section 14.05. Support of Child. (a) The court may order either or both parents to make periodic payments or a lump-sum payment, or both, for the support of the child until he is 18 years of age in the manner and to the persons specified by the court in the decree. In addition, the court may order a parent obligated to support a child to set aside property to be administered for the support of the child in the manner and by the persons specified by the court in the decree.

(b) If the court finds that the child, whether institutionalized or not, requires continuous care and personal supervision because of a mental or physical disability and will not be able to support himself, the court may order that payments for the support of the child shall be continued after the 18th birthday and extended for an indefinite period.

(c) The court may order the trustees of a spendthrift or other trust to make disbursements for the support of the child to the extent the trustees are required to make payments to a beneficiary who is required to make support payments under this section. If disbursement of the assets of the trust is discretionary in the trustees, the court may order payments for the benefit of the child from the income of the trust, but not from the principal.

(d) Unless otherwise agreed to in writing or expressly provided in the decree, provisions for the support of a child are terminated by the marriage of the child, the

removal of the child's disabilities for general purposes, or the death of a parent obligated to support the child.

Section 14.06. Agreements Concerning Conservatorship. (a) To promote the amicable settlement of disputes between the parties to a suit under this chapter, the parties may enter into a written agreement containing provisions for conservatorship and support of the child.

(b) If the court finds the agreement is not in the child's best interest the court may request the parties to submit a revised agreement or the court may make orders for the conservatorship and support of the child.

(c) If the court finds that the agreement is in the child's best interest, its terms shall be set forth in the decree and the parties shall be ordered to perform them.

(d) Terms of the agreement set forth in the decree may be enforced by all remedies available for enforcement of a judgment, including contempt, but are not enforceable as contract terms unless the agreement so provides.

Section 14.07. Best Interest of Child. (a) The best interest of the child shall always be the primary consideration of the court in determining questions of managing conservatorship, possession, and support of and access to the child. If the child is 14 years of age or older, he may, by writing filed with the court, choose the managing conservator, subject to the approval of the court.

(b) In determining the best interest of the child, the court shall consider the circumstances of the parents. In the event of the death of the parents, the grandparents may be considered but such consideration shall not alter or diminish the discretionary power of the court.

(c) In a nonjury trial the court may interview the child in chambers to ascertain the child's wishes as to his conservator. Upon the application of any party and when the issue of managing conservatorship is contested, the court shall confer with a child 12 years of age or older and may confer with a child under 12 years of age, but in either event the results of such interview shall not alter or diminish the discretionary power of the court. The court may permit counsel to be present at the interview. On the motion of a party or on the court's own motion, the court shall cause a record of the interview to be made when the child is 12 years of age or older, which record of the interview shall be made part of the record in the case.

Section 14.08. Modification of Order. (a) A court order or the portion of a decree that provides for the support of a child or the appointment of a conservator or that sets the terms and conditions of conservatorship for, support for or, access to a child may be modified only by the filing of a motion in the court having jurisdiction of the suit affecting the parent-child relationship. Any party affected by the order or the portion of the decree to be modified may file the motion.

(b) Each party whose rights, privileges, duties, or powers may be affected by the motion is entitled to at least 30 days' notice of a hearing on the motion to modify.

(c) After a hearing, the court may modify an order or portion of a decree that:

(1) designates a managing conservator if the circumstances of the child or parent have so materially and substantially changed since the entry of the order or decree to be modified that the retention of the present managing conservator would be injurious to the welfare of the child and that the appointment of the new

managing conservator would be a positive improvement for the child; or

(2) provides for the support of a child, sets the terms and conditions for access to or possession of a child, or prescribes the relative rights, privileges, duties,and powers of conservators if the circumstances of the child or a person affected by the order or portion of the decree to be modified have materially and substantially changed since the entry of the order or decree; except that an order providing for the support of a child may be modified only as to obligations accruing subsequent to the motion to modify.

(d) If the motion is filed for the purpose of changing the designation of the managing conservator and is filed within one year after the date of issuance of the order or decree to be modified, there shall be attached to the motion an affidavit executed by the person making the motion. The affidavit must contain at least one of the following allegations along with the supportive facts:

(1) that the child's present environment may endanger his physical health or significantly impair his emotional development; or

(2) that the managing conservator is the person seeking the modification or consents to the modification, and the modification is in the best interest of the child.

(e) On the filing of a motion to which the provisions of Subsection (d) of this section apply, the court shall deny the motion and refuse to schedule a hearing unless the court determines, on the basis of the affidavit, that adequate facts to support an allegation listed in Subdivision (1) or (2) of Subsection (d) of this section are stated in the affidavit. If the court determines that the facts stated are adequate to support an allegation, a time and place for the hearing shall be set.

Section 14.09. Enforcement of Order. (a) Any order of the court may be enforced by contempt.

(b) A court may enforce an order for support as provided in Rule 308A of the Texas Rules of Civil Procedure or any subsequent version of the rule promulgated by the supreme court.

(c) On the motion of any party entitled to receive payments for the benefit of a child, the court may render judgment against a defaulting party for any amount unpaid and owing after 10 days' notice to the defaulting party of his failure or refusal to carry out the terms of the order. The judgment may be enforced by any means available for the enforcement of judgments for debts.

(d) A parent may be compelled to testify fully in regard to his ability to support the child.

Section 14.10. Habeas Corpus. (a) If the right to possession of a child is presently governed by a court order, the court in a habeas corpus proceeding involving the right to possession of the child shall compel return of the child to the relator if and only if it finds that the relator is presently entitled to possession by virtue of the court order.

(b) The court shall disregard any cross action or motion pending for modification of the decree determining managing conservatorship, possession, or support of or access to the child unless it finds that:

(1) the previous order was granted by a court that did not have jurisdiction of the parties; or

(2) the child has not been in the relator's possession and control for at least 6 months immediately preceding the filing of the petition for the writ.

(c) The court may issue any appropriate temporary order if there is a serious immediate question concerning the welfare of the child.

(d) While in this state for the sole purpose of compelling the return of a child through a habeas corpus proceeding, the relator is not amenable to civil process and is not subject to the jurisdiction of any civil court except the court in which the writ is pending and in that court only for the purpose of prosecuting the writ.

(e) If the right to possession of a child is not governed by a court order, the court in a habeas corpus proceeding involving the right of possession of the child shall compel return of the child to the relator if, and only if, it finds that the relator has a superior right to possession of the child by virtue of the rights, privileges, duties, and powers of a parent as set forth in Section 12.04 of this code.

(f) The court shall disregard any motion for temporary or permanent adjudication relating to the possession of the child in a habeas corpus proceeding brought under Subsection (e) of this section unless at the time of the hearing an action is pending under this subtitle, in which case the court may proceed to issue any temporary order as provided by Section 11.11 of this code.

CHAPTER 15. TERMINATION OF THE PARENT-CHILD RELATIONSHIP

Section 15.01.	Termination When Parent Is Petitioner
Section 15.02.	Involuntary Termination of Parental Rights
Section 15.021.	Filing of Petition to Terminate Before Birth
Section 15.03.	Affidavit of Relinquishment of Parental Rights
Section 15.04.	Affidavit of Status of Child
Section 15.041.	Affidavit of Waiver of Interest in Child
Section 15.05.	Decree
Section 15.06.	Dismissal of Petition
Section 15.07.	Effect of Decree.

Section 15.01. Termination When Parent is Petitioner. A parent may file a petition requesting termination of the parent-child relationship with his child. The petition may be granted if the court finds that termination is in the best interest of the child.

Section 15.02. Involuntary Termination of Parental Rights. A petition requesting termination of the parent-child relationship with respect to a parent who is not the petitioner may be granted if the court finds that:

(1) the parent has:

(A) voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; or

(B) voluntarily left the child alone or in the possession of another not the parent without expressing

an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; or

(C) voluntarily left the child alone or in the possession of another not the parent and, although expressing an intent to return, failed to do so without providing adequate support of the child and remained away for a period of at least six months; or

(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child; or

(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; or

(F) failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition; or

(G) abandoned the child without identifying the child or furnishing means of identification, and the child's identity cannot be ascertained by the exercise of reasonable diligence; or

(H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

(I) contumaciously refused to submit to a reasonable and lawful order of a court under Section 34.05 of this code; or

(J) been the major cause of:

(i) the failure of the child to be enrolled in school as required by the Texas Education Code; or

(ii) the child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

(K) executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights as provided by Section 15.03 of this code; and in addition, the court further finds that

(2) termination is in the best interest of the child.

Section 15.021. Filing of Petition to Terminate Before Birth. A petition in a suit affecting the parent-child relationship which requests the termination of the parent-child relationship with respect to either or both parents may be filed before the birth of the child and after the first trimester of the mother's pregnancy. If the petition is filed before the birth of the child, no hearing on the termination may be held nor may orders other than temporary orders be issued until the child is at least five days old. If the petition is filed before the birth of the child, the term "unborn child" shall be substituted for the name of the child in all records and documents required by this title that are filed before the birth of the child. After the birth of the child, the name of the child shall be entered in the record and used in subsequent proceedings other than an adoption.

Section 15.03. Affidavit of Relinquishment of Parental Rights. (a) An affidavit for voluntary relinquishment of parental rights must be signed after the birth of the child by the parent, whether or not a minor, whose parental rights are to be relinquished, witnessed by two credible persons, and verified before any person authorized to take oaths.

(b) The affidavit must contain:

(1) the name, address, and age of the parent whose parental rights are being relinquished;

(2) the name, age, and birthdate of the child;

(3) the names and addresses of the guardians of the person and estate of the child, if any;

(4) a statement that the affiant is or is not presently obligated by court order to make payments for the support of the child;

(5) a full description and statement of value of all property owned or possessed by the child;

(6) allegations that termination of the parent-child relationship is in the best interest of the child;

(7) one of the following, as applicable:

(A) the name and address of the other parent;

(B) a statement that the parental rights of the other parent have been terminated by death or court order; or

(C) a statement that the child is not the legitimate child of the father and that an affidavit of status of child has been executed as provided by Section 15.04 of this code;

(8) a statement that the parent has been informed of his parental rights, powers, duties, and privileges; and

(9) a statement that the relinquishment is revocable, or that the relinquishment is irrevocable for a stated period of time.

(c) The affidavit may contain:

(1) a designation of any qualified person, the State Department of Public Welfare, or any authorized agency as managing conservator of the child;

(2) a waiver of process in a suit to terminate the parent-child relationship brought under Section 15.02(1)(K) of this code, or in a suit to terminate joined with a petition for adoption under Section 16.03(b) of this code; and

(3) a consent to the placement of the child for adoption by the State Department of Public Welfare or by an agency authorized by the State Department of Public Welfare to place children for adoption.

(d) An affidavit of relinquishment of parental rights which designates as the managing conservator of the child the State Department of Public Welfare or an agency authorized by the State Department of Public Welfare to place children for adoption is irrevocable. Any other affidavit of relinquishment is revocable unless it expressly provides that it is irrevocable for a stated period of time not to exceed 60 days after the date of its execution.

Section 15.04. Affidavit of Status of Child. (a) If the child is not the legitimate child of the father, an affidavit shall be executed by the mother, whether or not a minor, witnessed by two credible persons, and verified before any person authorized to take oaths.

(b) The affidavit must state:

(1) that the mother is not and has not been married to the father of the child;

(2) that the mother and father have not attempted to marry under the laws of this state or another state or nation;

(3) that paternity has not been established under the laws of any state or nation; and

(4) one of the following, as applicable:

(A) the father is unknown and no probable father is known;

(B) the name of the father, but the affiant does not know the whereabouts of the father;

(C) the father has executed a statement of paternity under Section 13.22 of this code and an affidavit of relinquishment of parental rights under Section 15.03 of this code and both affidavits have been filed with the court;

(D) the name and whereabouts of the father; or

(E) the name of any probable father of the child.

(c) The affidavit of status of child may be executed at any time after the first trimester of the pregnancy of the mother.

Section 15.041. Affidavit of Waiver of Interest in Child. (a) A person may execute an affidavit disclaiming any interest in a child and waiving notice or the service of citation in any suit to be filed affecting the parent-child relationship with respect to the child.

(b) The affidavit shall be signed by the person, whether or not a minor, witnessed by two credible persons, and verified before a person authorized to take oaths. The affidavit may be executed before the birth of the child.

(c) The affidavit may contain a statement that the affiant does not admit being the father of the child or having had a sexual relationship with the mother of the child.

(d) An affidavit of waiver of interest in a child may be used in any proceeding in which the affiant attempts to establish an interest in the child. The affidavit may not be used in any proceeding brought by another person to establish the affiant's paternity of the child.

Section 15.05. Decree (a) If the court finds grounds for termination of the parent-child relationship, it shall enter a decree terminating the parent-child relationship.

(b) If the court terminates the parent-child relationship with respect to both parents or to the only living parent, the court shall appoint a suitable, competent adult or authorized agency as managing conservator of the child. An agency designated managing conservator in an unrevoked or irrevocable affidavit of relinquishment shall be appointed managing conservator. The order of appointment may refer to the docket number of the suit and need not refer to the parties nor be accompanied by any other papers in the record.

(c) If the court does not order termination of the parent-child relationship, it shall:

(1) dismiss the petition; or

(2) enter any order considered to be in the best interest of the child.

Section 15.06. Dismissal of Petition. A petition for termination of the parent-child relationship may not be dismissed on the motion of the petitioner except by order of the court entered on the written motion of all parties to the proceeding. Unless otherwise stated in the court's order, the dismissal is without prejudice.

Section 15.07. Effect of Decree. A decree terminating the parent-child relationship divests the parent and the child of all legal rights, privileges, duties, and powers, with respect to each other, except that the child retains the right to inherit from and through its divested parent unless the court otherwise provides. Nothing in this chapter shall preclude or affect the rights of a natural maternal or paternal grandparent to reasonable access under Section 14.03(d) of this code.

CHAPTER 17. SUIT FOR PROTECTION OF CHILD IN EMERGENCY

Section 17.01. Taking Possession in Emergency
Section 17.02 Hearing
Section 17.03. Notice
Section 17.04. Grounds and Disposition
Section 17.05. Duration of Order
Section 17.06. Modification
Section 17.07. Effect of Appeal
Section 17.08. Continuing Jurisdiction Not Retained
Section 17.09. Civil Liability

Section 17.01. Taking Possession in Emergency. An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle, whether or not the court has continuing jurisdiction under Section 11.05 of this code. The child shall be delivered immediately to the court.

Section 17.02. Hearing. Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

Section 17.03. Notice. The proceeding under Section 17.02 of this code may be held without notice.

Section 17.04. Grounds and Disposition. On a showing that the child is apparently without support

and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

Section 17.05. Duration of Order. (a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

(1) order such restoration of possession; or

(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction.

Section 17.06. Modification. On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child.

Section 17.07. Effect of Appeal. An appeal from an emergency order made under this chapter does not stay the order.

Section 17.08. Continuing Jurisdiction Not Retained. The court having jurisdiction of a child under this chapter does not retain continuing jurisdiction within the meaning of Section 11.05 of this code.

Section 17.09. Civil Liability. A person who takes possession of a child under Section 17.01 of this code is immune from civil liability if, at the time possession is taken, he had reasonable cause to believe there was an immediate danger to the physical safety or emotional well-being of the child.

CHAPTER 34. REPORT OF CHILD ABUSE

Section 34.01.	Persons Required to Report
Section 34.02.	Contents of Report: To Whom Made
Section 34.03.	Immunities
Section 34.04.	Privileged Communications
Section 34.05.	Investigation and Report of Receiving Agency
Section 34.06.	Central Registry
Section 34.07.	Failure to Report: Penalty
Section 34.08.	Confidentiality

Section 34.01. Persons Required to Report. Any person having cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect shall report in accordance with Section 34.02 of this code.

Section 34.02. Contents of Report: To Whom Made. (a) Nonaccusatory reports reflecting the reporter's belief that a child has been or will be abused or neglected, or has died of abuse or neglect, has violated the compulsory school attendance laws on three or more occasions, or has, on three or more occasions, been voluntarily absent from his home without the consent of his parent or guardian for a substantial length of time or without the intent to return shall be made to:

(1) the State Department of Public Welfare;

(2) the agency designated by the court to be responsible for the protection of children; or

(3) any local or state law enforcement agency.

(b) All reports must contain the name and address of the child, the name and address of the person responsible for the care of the child, if available, and any other pertinent information.

(c) All reports received by any local or state law enforcement agency shall be referred to the State Department of Public Welfare or to the agency designated by the court to be responsible for the protection of children.

(d) An oral report shall be made immediately on learning of the abuse or neglect as prescribed in Subsection (a) of this section, and a written report shall be made within five days to the same agency or department. Anonymous reports, while not encouraged, will be received and acted on in the same manner as acknowledged reports.

Section 34.03. Immunities. Any person reporting pursuant to this chapter is immune from liability, civil or criminal, that might otherwise be incurred or imposed. Immunity extends to participation in any judicial proceeding resulting from the report. Persons reporting in bad faith or malice are not protected by this section.

Section 34.04. Privileged Communications. In any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communication except in the case of communications between attorney and client.

Section 34.05. Investigation and Report of Receiving Agency. (a) The State Department of Public Welfare or the agency designated by the court to be responsible for the protection of children shall make a thorough investigation promptly after receiving either

the oral or written report. The primary purpose of the investigation shall be the protection of the child.

(b) In the investigation the department or agency shall determine:

(1) the nature, extent, and cause of the abuse or neglect;

(2) the identity of the person responsible for the abuse or neglect;

(3) the names and conditions of the other children in the home;

(4) an evaluation of the parents or persons responsible for the care of the child;

(5) the adequacy of the home environment;

(6) the relationship of the child to the parents or persons responsible for the care of the child;

(7) all other pertinent data.

(c) The investigation shall include a visit to the child's home, a physical and psychological or psychiatric examination of all the children in that home, and an interview with the subject child. If admission to the home, school, or any place where the child may be, or permission of the parents or persons responsible for the child's care for the physical and psychological or psychiatric examinations cannot be obtained, then the juvenile court, or the district court, upon cause shown, shall order the parents or the persons responsible for the care of the children, or the person in charge of any place where the child may be, to allow entrance for the interview, above examinations, and investigation.

(d) If, before the investigation is complete, the opinion of the investigators is that immediate removal is

necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this code for temporary care and protection of the child.

(e) The agency designated by the court to be responsible for the protection of children or the department shall make a complete written report of the investigation. The report, together with its recommendations, shall be submitted to the juvenile court or the district court, the district attorney, and the appropriate law enforcement agency if sufficient grounds for the institution of a suit affecting the parent-child relationship are found.

(f) On the receipt of the report and recommendation required by Subsection (e) of this section, the court may direct the investigator to file a petition seeking appropriate relief under Subtitle A of this title.

Section 34.06. Central Registry. The State Department of Public Welfare shall establish and maintain in Austin, Texas, a central registry of reported cases of child abuse or neglect. The department may adopt rules and regulations as are necessary in carrying out the provisions of this section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system.

Section 34.07. Failure to Report: Penalty. (a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report in accordance with Section 34.02 of this code.

(b) An offense under this section is a Class B misdemeanor.

Section 34.08. Confidentiality. The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

CHAPTER 35. CONSENT TO MEDICAL TREATMENT

Section 35.01.	Who May Consent
Section 35.02.	Consent Form
Section 35.03.	Consent to Treatment by Minor
Section 35.04.	Examination of Abused or Neglected Children

Section 35.01. Who May Consent. Any of the following persons may consent to medical treatment of a minor when the person having the power to consent as otherwise provided by law cannot be contacted and actual notice to the contrary has not been given by that person:

(1) a grandparent;

(2) an adult brother or sister;

(3) an adult aunt or uncle;

(4) an educational institution in which the minor is enrolled that has received written authorization to consent from the person having the power to consent as otherwise provided by law;

(5) any adult who has care and control of the minor and has written authorization to consent from the person having the power to consent as otherwise provided by law; or

(6) any court having jurisdiction of the child.

Section 35.02. Consent Form. (a) Consent to medical treatment under Section 35.01 of this code shall be in writing, signed by the person giving consent, and given to the doctor, hospital, or other medical facility that administers the treatment.

(b) The consent must contain:

(1) the name of the minor;

(2) the name of one or both parents, if known, and the name of the managing conservator or guardian of the person, if either has been appointed;

(3) the name of the person giving consent and his relation to the minor child;

(4) a statement of the nature of the medical treatment to be given; and

(5) the date on which the treatment is to begin.

Section 35.03. Consent to Treatment by Minor. (a) A minor may consent to the furnishing of hospital, medical, surgical, and dental care by a licensed physician or dentist if the minor:

(1) is on active duty with the armed services of the United States of America;

(2) is 16 years of age or older and resides separate and apart from his parents, managing conservator, or guardian, whether with or without the consent of the parents, managing conservator, or guardian and regardless of the duration of such residence, and is managing his own financial affairs, regardless of the source of the income;

(3) consents to the diagnosis and treatment of any infectious, contagious, or communicable disease which is required by law or regulation adopted pursuant to law to be reported by the licensed physician or dentist to a local health officer;

(4) is unmarried and pregnant, and consents to hospital, medical, or surgical treatment, other than abortion, related to her pregnancy;

(5) is 18 years of age or older and consents to the donation of his blood and the penetration of tissue necessary to accomplish the donation; or

(6) consents to examination and treatment for drug addiction, drug dependency, or any other condition directly related to drug use.

(b) Consent by a minor to hospital, medical, surgical, or dental treatment under this section is not subject ot (sic) disaffirmance because of minority.

(c) Consent of the parents, managing conservator, or guardian of a minor is not necessary in order to authorize hospital, medical, surgical, or dental care under this section.

(d) A licensed physician or dentist may, with or without the consent of a minor who is a patient, advise the parents, managing conservator, or guardian of the minor of the treatment given to or needed by the minor.

(e) A physician or dentist licensed to practice medicine or dentistry in this state or a hospital or medical facility shall not be liable for the examination and treatment of minors under this section except for his or its own acts of negligence.

(f) A physician, dentist, hospital, or medical facility may rely on the written statement of the minor containing the grounds on which the minor has capacity to consent to his own medical treatment under this section.

Section 35.04. Examination of Abused or Neglected Children. (a) Except as provided in Subsection (b) of this section, a licensed physician or dentist having reasonable grounds to believe that a child's physical or mental condition has been adversely

affected by abuse or neglect may examine the child without the consent of the child, the child's parents, or other person authorized to consent for the child or his parents. The examination may include X-rays, blood tests, and penetration of tissue necessary to accomplish these tests.

(b) Unless consent is obtained as otherwise allowed by law, a physician or dentist may not examine a child:

(1) who is 16 years old or over and refuses to consent; or

(2) if consent is refused by an order of a court.

(c) A physician or dentist examining a child under the authority of this section is not liable for damages except those damages resulting from his negligence.

APPENDIX J

TEXAS RULES OF CIVIL PROCEDURE REGARDING INJUNCTION

RULE 680
RULE 681
RULE 682
RULE 683
RULE 685
RULE 686
RULE 687
RULE 688
RULE 689
RULE 690
RULE 692
RULE 693

SECTION 5. INJUNCTIONS

Rule 680. Temporary Restraining Order.

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Source: Federal Rule 65(b), with minor textual change, superseding Art. 4654.

Rule 681. Temporary Injunctions: Notice

No temporary injunction shall be issued without notice to the adverse party.

Source: Federal Rule 65(a), with minor textual change.

Rule 682. Sworn Petition

No writ of injunction shall be granted unless the applicant therefor shall present his petition to the judge verified by his affidavit and containing a plain and intelligible statement of the grounds for such relief. Amended by order of March 31, 1941, effective Sept. 1, 1941.

Source: Art. 4647, unchanged.

Rule 683. Form and Scope of Injunction or Restraining Order

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Source: Federal Rule 65(d), unchanged.

Rule 685. Filing and Docketing

Upon the grant of a temporary restraining order or an order fixing a time for hearing upon an application for a temporary injunction, the party to whom the same is granted shall file his petition therefor, together with the order of the judge, with the clerk of the proper court; and, if such orders do not pertain to a pending suit in said court, the cause shall be entered on the docket of the court in its regular order in the name of the party applying for the writ as plaintiff and of the opposite party as defendant.

Source: Art. 4650, harmonized with the Federal Rules adopted above by minor textual change.

Rule 686. Citation

Upon the filing of such petition and order not pertaining to a suit pending in the court, the clerk of such court shall issue a citation to the defendant as in other civil cases, which shall be served and returned in like manner as ordinary citations issued from said court; provided, however, that when a temporary restraining order is issued and is accompanied with a true copy of plaintiff's petition, it shall not be necessary for the citation in the original suit to be accompanied with a copy of plaintiff's petition, nor contain a statement of the nature of plaintiff's demand, but it shall be sufficient for said citation to refer to plaintiff's claim as set forth in a true copy of plaintiff's petition which accompanies the temporary restraining order; and provided further that the court may have a hearing upon an application for a temporary restraining order or temporary injunction at such time and upon such reasonable notice given in such manner as the court may direct. Amended by order of June 16, 1943, effective Dec. 31, 1943; order of Aug. 18, 1947, effective Dec. 31, 1947.

Source: Art. 4655

Rule 687. Requisites of Writ

The writ of injunction shall be sufficient if it contains substantially the following requisites:

(a) Its style shall be, "The State of Texas."

(b) It shall be directed to the person or persons enjoined.

(c) It must state the names of the parties to the proceedings, plaintiff and defendant, and the nature of the plaintiff's application, with the action of the judge thereon.

(d) It must command the person or persons to whom it is directed to desist and refrain from the commission or continuance of the act enjoined, or to obey and execute such order as the judge has seen proper to make.

(e) If it is a temporary restraining order, it shall state the day and time set for hearing, which shall not exceed ten days from the date of the court's order granting such temporary restraining order; but if it is a temporary injunction, issued after notice, it shall be made returnable at or before ten o'clock a.m. of the Monday next after the expiration of twenty days from the date of service thereof, as in the case of ordinary citations.

(f) It shall be dated and signed by the clerk officially and attested with the seal of his office and the date of its issuance must be indorsed thereon.

Source: Art. 4651.

Rule 688. Clerk To Issue Writ

When the petition, order of the judge and bond have been filed, the clerk shall issue the temporary

restraining order or temporary injunction, as the case may be, in conformity with the terms of the order, and deliver the same to the sheriff or any constable of the county of the residence of the person enjoined, or to the applicant, as the latter shall direct. If several persons are enjoined, residing in different counties, the clerk shall issue such additional copies of the writ as shall be requested by the applicant.

Source: Art. 4652, with minor textual change.

Rule 689. Service and Return

The officer receiving a writ of injunction shall indorse thereon the date of its receipt by him, and shall forthwith execute the same by delivering to the party enjoined a true copy thereof. The original shall be returned to the court from which it issued on or before the return day named therein with the action of the officer indorsed thereon or annexed thereto showing how and when he executed the same.

Source: Art. 4653, unchanged.

Rule 690. The Answer

The defendant to an injunction proceeding may answer as in other civil actions; but no injunction shall be dissolved before final hearing because of the denial of the material allegations of the plaintiff's petition, unless the answer denying the same is verified by the oath of the defendant.

Source: Art. 4657, unchanged.

Rule 692. Disobedience

Disobedience of an injunction may be punished by the court or judge, in term time or in vacation, as a contempt. In case of such disobedience, the

complainant, his agent or attorney, may file in the court in which such injunction is pending or with the judge in vacation, his affidavit stating what person is guilty of such disobedience and describing the acts constituting the same; and thereupon the court or judge shall cause to be issued an attachment for such person, directed to the sheriff or any constable of any county, and requiring such officer to arrest the person therein named if found within his county and have him before the court or judge at the time and place named in such writ; or said court or judge may issue a show cause order, directing and requiring such person to appear on such date as may be designated and show cause why he should not be adjudged in contempt of court. On return of such attachment or show cause order, the judge shall proceed to hear proof; and if satisfied that such person has disobeyed the injunction, either directly or indirectly, may commit such person to jail without bail until he purges himself of such contempt, in such manner and form as the court or judge may direct. As amended by order of June 16, 1943, effective December 31, 1943.

Source: Art. 4661.

Rule 693. Principles of Equity Applicable

The principles, practice and procedure governing courts of equity shall govern proceedings in injunctions when the same are not in conflict with these rules or the provisions of the statutes.

Source: Art. 4663, with minor textual change.

Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 78-6

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

VOLUME III

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

On Appeal From The United States District
Court For The Southern District Of Texas
Houston Division

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PRE-TRIAL ORDER
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DEFENDANTS WOULD CALL THE FOLLOWING WITNESSES
EXPERT WITNESS SUMMARY OF QUALIFICATIONS

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEST FRIENDS OF THEIR MINOR CHILDREN SABRINA MARIE SIMS, PAUL EDWARD SIMS AND SHAWANA EVETTE SIMS,	)	
Plaintiffs,	)	
VERSUS	)	CIVIL ACTION NO.
RAUL JIMENEZ, JAMIE CLEMENTS AND HILMAR G. MOORE, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE STATE BOARD OF PUBLIC WELFARE; RAYMOND VOWELL, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE; GENE LEGE, INDIVIDUALLY	)	76-H-665

AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE; MARIAN LOCKELY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE MONTGOMERY COUNTY WELFARE UNIT OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE; AND ALL WITH THEM, PERSONS ACTING IN CONCERT OR COOPERATION OR AT THEIR DIRECTION,	)
Defendants.	)

PRETRIAL ORDER

. . .

Defendants' Statement of the Case:

On March 25, 1976, the State Department of Public Welfare received a report of physical abuse to Paul Sims, an eight year old student at an elementary school in Houston, Texas. Rex Downing, a welfare case worker, was assigned to go to the school in order to investigate. He was advised that the child had received a spanking from his father, John P. Sims, earlier in the day. Following an examination of Paul's injuries, which included bleeding from both buttocks, Downing arranged to have the boy and his sisters, who attended

the school, examined by a doctor at the Harris County Child Welfare Unit.

After examination, the physician, Dr. Marie Surgi, concluded that Paul Sims was a very badly bruised and abused child. His buttocks were found to have ulcerated skin in the center oozing blood. He had numerous bruises on other parts of his body. His sisters were also found to have bruises to a lesser extent.

In conversation, it was determined that Mrs. Sims had administered physical discipline to Paul the night before, on March 24, 1976. Teachers testified to the beating at school on March 25.

The Harris County Child Welfare Unit decided to take possession of the children in this emergency situation in order to protect them from danger to their health and physical safety. (Chapter 17, Texas Family Code, Sec. 17.01). This was accomplished by placing the children in a foster home until further investigation could be conducted.

The Harris County Child Welfare Unit then proceeded to file a Suit for Protection of Child in Emergency. This was done without notice to the parents, pursuant to Section 17.03 of the code. The suit asked that Gene Lege, Director, Harris County Child Welfare Unit be appointed temporary managing conservator of the Sims children, pending further investigation. This suit was filed on March 26, 1976, and a temporary order was issued on that day. All of this was done pursuant to Chapter 17, of the Family Code which authorizes such temporary orders for a period not to exceed ten days.

On March 26, 1976, the Sims retained an attorney, Gladys Goffney, to represent them in the proceedings regarding their children.

On March 31, 1976, Mrs. Goffney submitted a Motion to Modify the emergency order previously granted pursuant to Chapter 17 of the Family Code. Section 17.06 makes it mandatory upon the Court to conduct a hearing, if a parent, after notice to those involved in the original hearing, seeks to modify an emergency order granted under Chapter 17. For some reason, not satisfactorily explained, the clerk failed to accept and schedule the motion, and the attorney for the plaintiffs did not insist upon its being filed. Neither did the attorney for the plaintiffs seek a writ of mandamus requiring the clerk to accept the motion for filing and the judge to conduct a hearing pursuant thereto. Needless to say, such a hearing would have allowed the parents an opportunity to present their case fully within the first ten days after the granting of the original temporary order.

Instead of proceeding with the motion to modify, a remedy available under Chapter 17 of the Family Code, the attorney for the plaintiff filed a Petition for Writ of Habeas Corpus in the Juvenile Court of Harris County, Texas. Without alleging in specific terms the manner in which the children were "illegally confined and restrained" by Harris County Child Welfare, the Sims petitioned the Court to have the children brought immediately before the Court so that they might be returned to the Petitioners. The Court held a hearing and refused to grant the petition on April 5, 1976. No further action has been taken in the habeas corpus matter.

At the hearing on Petition for Writ of Habeas Corpus, the Juvenile Court was advised that the parents and children were residents of Montgomery County, Texas. The Juvenile Court of Harris County allowed the Harris County Child Welfare Unit until 5:00 P.M. on April 5 to file a proceeding under Chapter 11 and 14 of the

Family Code after which the matter would be transferred to Montgomery County. An Original Petition in Suit Affecting Parent-Child Relationship was filed and an ex parte temporary order in the nature of a temporary restraining order was issued pursuant to Section 11.11 of the Family Code. Further, the matter was transferred to the Juvenile Court of Montgomery County pursuant to Section 11.06 of the Family Code. At this time, Paul Sims was in the hospital recovering from the physical abuse inflicted upon him by his parents. It was the feeling of the Harris County Child Welfare Unit that the children should not be returned to the parents until the parents had an opportunity to attend counseling. The judge agreed.

On April 6, 1976, after the temporary order pursuant to Section 11.11 was signed, the Juvenile Court of Harris County was unable to set a time for a hearing in Montgomery County on temporary injunction as required by Section 11.11(b) of the Family Code, and Rules 680 and 681, Texas Rules of Civil Procedure. Therefore, at the time of transfer of all papers to the Juvenile Court of Montgomery County, a temporary order was in effect, due to expire within 10 days from April 5, 1976, unless continued as provided in Rules 680 and 681, Texas Rules of Civil Procedure. This order provided that immediate temporary conservatorship be placed in Gene Lege, Director of the Harris County Child Welfare Unit, with respect to the three Sims children. However, the order did not state, on its face, that it was an ex parte order or that it was to expire in 10 days.

On April 9, 1976, the file in the Sims case was received by the Juvenile Court of Montgomery County, Texas. The order signed by Judge Robert L. Lowry, Juvenile Judge of Harris County, was evidently treated as a preliminary injunction, rather than as a temporary

restraining order by Judge Coker of the Juvenile Court of Montgomery County, Texas. Consequently, no hearing on a temporary injunction was set nor was any service of process issued. The attorney for the Sims did not seek to have such a hearing set down or to obtain a writ of mandamus requiring one to be held.

Instead of the plaintiff seeking a full evidentiary hearing on the merits, on April 20, 1976, this cause was filed in United States District Court. At a hearing on May 5, 1976, the Court found that the Sims children were not in the legal possession of the Harris County Child Welfare Unit. Due to the expiration of the temporary restraining order, issued ex parte under Section 11.11 of the Family Code, this Court issued an order returning the children to the custody of their parents.

In taking action to return the Sims children to the custody of their parents on May 5, 1976, this Court advised the State Department of Public Welfare and its attorneys that the State was not enjoined from taking action under state law to properly establish a temporary conservatorship in the State Department of Public Welfare.

On May 14, 1976, the State Department of Public Welfare sought, once again, to protect Paul Sims by filing another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County, Texas.

The Court was asked to appoint Helen Jurries, Supervisor, State Department of Public Welfare, as Managing Conservator of Paul Sims. On May 14, 1976, Judge Coker signed a show cause order with writ of attachment which ordered Paul Sims delivered to Mr. and Mrs. James Carter, the grandparents by adoption of Paul Sims, and naming them temporary managing

conservator of Paul Sims. The court set a hearing for May 21, 1976, at which the continuation of the temporary conservatorship was to be considered. Despite several efforts to serve this writ, the Sims were not served and the date for the hearing was changed to June 10, 1976.

On May 21, 1976, the Plaintiffs filed an application for temporary restraining order seeking to halt state court proceedings. A temporary restraining order was granted, ex parte, on May 21, 1976. A hearing was held on June 7, 1976, at which time an order was issued restraining any further proceedings in state court, pending final adjudication on the merits herein.

Instead of leaving this suit in state court, where all constitutional and substantive questions in this matter could be adjudicated, this Court is faced with a challenge to a state statute, formulated after several years of careful consideration. The plaintiffs, thus far, have been allowed to escape any carefully considered presentation of the merits of the child abuse questions herein. Further, the seek to completely nullify all of the provisions of Chapters 11, 14, 15, 17 and 34 of Title II of the Texas Family Code.

The Defendants, if necessary, will fully support the reasonableness, compelling state interest, and constitutionality of the Family Code provision challenged herein.

II. DEFENDANTS CONTEND THAT:

The Defendant agents and employees of the State Department of Public Welfare claim that local welfare workers acted in good faint to protect the best interest of the children, Paul, Shawana and Sabrina Sims, by seeking valid judicial orders in Harris and Montgomery Counties to create a temporary managing conservatorship and give the managing conservator temporary custody of the children. This occurred after evidence of severe physical abuse was found, for which both parents have some responsibility. The defendants acknowledge that the children were kept in foster homes after a temporary order under Chapter 11 had expired. However, the parents, who retained an attorney shortly after the children were taken from the home were remiss in failing to insist on their right to file a motion to modify the order of the Harris County Court and to have an evidentiary hearing on the same. Likewise, they failed to insist upon their right to a hearing from the State Court in Montgomery County. The Defendants would further show that, while there may have been a failure to comply with one aspect of the Texas Family code, the Code is constitutional on its face and there is a compelling state interest to allow quick and effective emergency removal of children from homes where child abuse occurs.

ADMISSIONS OF FACT

PLAINTIFFS AND DEFENDANTS LIST THE FOLLOWING FACTS THAT HAVE BEEN STIPULATED AND ADMITTED AND WHICH WILL REQUIRE NO PROOF:

1. On March 25, 1976, adult and minor plaintiffs maintained a residence located at Route 3, Box 1304, Conroe, Montgomery County, Texas.

2. On March 25, 1976, the three minor plaintiffs were enrolled in and regularly attending classes at John G. Osborne Elementary School in Houston, Harris County, Texas, for which adult minor plaintiffs paid a monthly tuition charge to the Houston Independent School District.

3. Minor plaintiffs Sabrina Marie Sims, the only natural born child of adult plaintiffs, was born to them August 16, 1967, and is now age nine years.

4. Minor plaintiff Paul Edward Sims was born December 10, 1967, is now age eight years, and was adopted by adult plaintiffs through Harris County Child Welfare Unit (hereafter referred to as Child Welfare) pursuant to Decree of Adoption granted July 18, 1974, by Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas (hereafter referred to as Juvenile Court).

5. Minor plaintiff Shawana Evette Sims was born March 2, 1969, is now age seven years, and was adopted by adult plaintiffs through Child Welfare pursuant to Decree of Adoption granted by Judge Lowry on August 12, 1975.

6. On March 25, 1976, in response to a telephone report of child abuse made by personnel of John G.

Osborne Elementary School regarding only the minor plaintiff Paul Edward Sims, Child Welfare's agent and employee Caseworker Rex Downing went to the school.

7. That Casewarker (sic) Downing who went to the school March 25, 1976, to make investigation interviewed the minor plaintiff Paul Edward Sims who had been the subject of the telephone report of abuse for "Maybe a couple of minutes, three minutes."

8. That Rex Downing took possession and control of Paul Edward Sims, Shawana Evette Sims and Sabrina Marie Sims on March 25, 1976.

9. That Harris County Child Welfare did not physically deliver the three minor plaintiffs to the Court on March 25, 1976, nor were they delivered to the Court at any time prior to April 4, 1976. On April 5, 1976, minor plaintiffs were delivered to the Juvenile Court of Harris County pursuant to Subpoena for Writ of Habeas Corpus.

10. The following day, March 26, 1976, at 4:54 P.M., Betsy C. Conner filed a Suit For Protection of Child in Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code, which was docketed under Cause No. 38,295 in the Juvenile Court Number One of Harris County, Texas, and in which all three minor plaintiffs were made subjects of suit.

11. No names of places of residence of the parents or persons responsible for the care of the three minors appears at any place in the suit referred to in paragraph 10, supra, although the Petitioner therein requests "that citation and notice be issued to all persons named."

12. Six minutes after time of filing of such suit and at 5:00 P.M. on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court entered an Ex Parte Order by the terms of which Gene Lege, Director of Harris County Child Welfare was made temporary managing conservator of the three minor plaintiffs.

13a. On its face such Ex Parte Order recited that the matter was presented to the Court in chambers, without notice to or hearing afforded the adult plaintiffs.

13. No notice, citation or process of any kind was ever issued or served upon the adult plaintiffs in connection with the suit docketed as Cause No. 38,295 filed March 26, 1976.

14. (There is a marginal note at this point which reads *"Plaintiffs contested issue of fact."*) On March 31, 1976, counsel for the adult plaintiffs filed a Motion To Modify Temporary Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "JUV" by the Clerk of the Juvenile Court but were returned to counsel for adult plaintiffs by the Clerk who testified in a hearing before Honorable John V. Singleton on May 5, 1976 at Pg. 75 of the transcript, "Well, with the absence of Judge Lowry, I had taken to Judge Coe, and Judge Coe said he did not want to intervene in any of Judge Lowry's orders that he'd already signed in a case and he's rather for Judge Lowry to see this and he did bring it to my attention to file a Writ of Habeas Corpus in the District Clerk's office."

15. On March 31, 1976, counsel for adult plaintiffs filed a Petition for Writ of Habeas Corpus seeking return

of the three minor plaintiffs, which suit was docketed as Cause No. 1,069,341 in the Juvenile Court Number One of Harris County, Texas, and upon which a hearing was set for April 5, 1976, at 10:30 A.M., at which time the minor plaintiffs were delivered to the Court pursuant to Subpoena for Writ of Habeas Corpus upon Gene Lege.

16. Adult plaintiffs caused notice of the filing of their Petition For Writ of Habeas Corpus and of the hearing set thereon to be served upon Gene Lege, Director of Harris County Child Welfare and also issued Subpoenas for attendance of witnesses.

17. On the date and at the time scheduled for hearing on the Petition For Writ of Habeas Corpus, Judge Lowry determined that all of the Plaintiffs were residents of Montgomery County, Texas.

18. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the Habeas Corpus proceeding, although Judge Lowry had personal knowledge that the three minor plaintiffs were restrained in Harris County, Texas, by virtue of his own Ex Parte Order entered March 26, 1976.

19. The Docket Sheet entry made in Cause No. 1,069,341 in the handwriting of Robert L. Lowry, Judge of the Juvenile Court Number One of Harris County, Texas, on April 5, 1976, reads as follows: "Venue in Montgomery County - Case transferred to Montgomery County."

20. Later and at 4:47 P.M. on April 5, 1976, Betsy C. Conner filed a second suit in Cause No. 38,295 on the docket of the Juvenile Court Number One of Harris County, Texas, entitled Original Petition In Suit Affecting The Parent-Child Relationship.

21. At a time subsequent to the 4:47 filing of the Original Petition referred to in Paragraph 20, supra, but still on April 5, 1976, Judge Lowry entered a second Ex Parte Order continuing temporary managing conservatorship, possession and control of the three minor plaintiff (sic) in Gene Lege, Director, Harris County Child Welfare.

22. This second Ex Parte Order setting both temporary and final hearings in the second suit shows them both to be set for "the ___ day of _____, 19__ at ____ O'clock __.M." and appoints "An attorney _____. . .to serve as guardian ad litem and attorney ad litem and represent the minor child(ren) at all hearings. . . ". On its face this same Order recites it was presented to the Court in chambers.

23. On May 5, 1976, at a hearing in the Federal Court, there was testimony adduced that the blanks appearing in the Order had never been filled in.

24. On April 6, 1976, Docket Sheet entries made in the handwriting of Judge Lowry show the Suit Affecting the Parent-Child Relationship (Cause No. 38,295) and the Habeas Corpus proceeding (Cause No. 1,069,341) were transferred to the Juvenile Court of Montgomer (sic) County, Texas while the minor plaintiffs remained in Harris County in the possession of Harris County Child Welfare.

25. On April 9, 1976, the full file in Cause No. 38,295 transferred by the Juvenile Court Number One of Harris County, Texas, was received by the Juvenile Court of Montgomery County, Texas and docketed under Cause No. 3,030.

26. From April 6, 1976, when the file was received by the Montgomery County Juvenile Court up to and

including May 5, 1976, the first date of hearing before this Court, no notice, citation or process of any kind was issued or served upon the adult plaintiffs in Cause No. 3,030 nor were they afforded opportunity for hearing before the Juvenile Court of Montgomery County, Texas.

27. The three minor plaintiffs remained in the possession and control of Harris County Child Welfare during such period referred to in item 26, supra.

28. On May 4, 1976, still seeking return of their children, adult plaintiffs filed an Application For Leave To File Writ Of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting in Houston. Such application was denied by the Court for lack of jurisdiction on May 4, 1976.

29. Plaintiffs' First Complaint was filed with the Federal Court on April 19, 1976.

30. Nine days after this Court ordered return of the minor plaintiffs, a third suit was begun by the filing of an Original Petition In Suit Affecting the Parent-Child Relationship which was docketed as Cause No. 3,090 in the Juvenile Court of Montgomery County, Texas, on May 14, 1976.

31. The suit filed in Montgomery County on May 14, 1976, referred to in Paragraph 30, supra, pertained only to the minor plaintiff Paul Edward Sims and had attached as an Exhibit the identical Exhibit attached to the suit filed March, 26, 1976, in Harris County, Texas, under Cause No. 38,295.

32. Based upon medical information and other information which was fifty (50) days old, Ernest

Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas issued an Ex Parte Writ of Attachment for the minor plaintiff Paul Edward Sims on May 14, 1976.

33. On May 21, 1976, counsel for plaintiffs made application for and Honorable John V. Singleton, Jr. entered a Temporary Restraining Order which was followed by and (sic) Order of Preliminary Injunction of this three-judge court entered June 18, 1976, restraining and enjoining defendants from filing or prosecuting any state suit based upon the state statutes to which plaintiffs have lodged this constitutional challenge.

34. This three-judge Court found "irreparable harm and injury to Plaintiffs: 1) by the very fact that in the initial proceeding initiated by the State the plaintiffs' family unit was disrupted for a total or (sic) forty-two (42) days without any type of relief afforded to plaintiffs; and 2) if the defendants were allowed to initiate further proceedeings plaintiffs would be placed in a similar situation as they had been prior to obtaining Federal Court relief."

35. That Raymond Vowell, Commissioner, State Department of Public welfare has answered by Interrogatory No. 10 that "the source of the CANRIS report has been deleted in accordance with Sec. 34.08 of the Texas Family Code."

36. That on or about April 7, 1976, and before the May 5, 1976, hearing in Federal Court, that Rex Downing as caseworker for the Harris County Child Welfare Unit knew or had cause to know of Paul Sims' statements that "his teacher Mrs. Rhea had spanked him on March 25, 1976, at the John G. Osborne Elementary School".

37. That Rex Downing, Harris County Child Welfare Worker recommended Termination of the Paren (sic)-Child Relationship between the Sims and Paul Edward Sims.

38. Information gathered by Harris County Child Welfare in the course of adoption of the minor plaintiffs Paul Edward Sims and Shawana Evette Sims by the adult plaintiffs in 1974 and 1975 was used by Harris County Child Welfare in this present matter.

39. That the State Department deleted the word 'masturbated' from the hand written notes of Dr. Marie Surgi attached to Section 17.01 Suit for Protection of Child in Emergency and filed in Juvenile Court March 26, 1976.

40. On March 27, 1976, Paul Edward Sims was admitted to St. Joseph's Hospital where he remained as a patient until April 7, 1976.

41. Child abuse occurs in homes at all socio-economic levels.

42. Child abuse patterns may require an emergency removal of the child from its home in order to protect its physical health and safety.

43. John and Mary Sims utilize a board paddle and a belt as a means of discipline (sic) for their chidren (sic). (Plaintiffs object as to relevancy.)

44. On the evening of March 24, 1976, Paul Edward Sims was spanked by his mother, Mrs. Mary Sims. (Plaintiffs object as to relevancy.)

45. On the morning of March 25, 1976, Paul Edward Sims was paddled with a board paddle at school by his father, John Pleasant Sims. (Plaintiffs object as to relevancy.)

46. Mr. & Mrs. Sims have a combined income of over $32,000. (Plaintiffs object as to relevancy.)

47. Counseling and therapy can assist many perpetrators of child abuse (Plaintiffs object as to relevancy)

PLAINTIFFS

CONTESTED ISSUES OF FACT

1. That Rex Downing took possession and control of the three minor plaintiffs Paul Edward Sims, Sabrina Marie Sims and Shawana Evette Sims shortly after 1:30 P.M. on March 25, 1976, and caused all three to be transported to the Child Welfare Clinic at 4040 Milam, Houston, Harris County, Texas.

2. (There is a marginal note at this point which reads *"Defendant's admit this fact."*) No Writ of a magistrate was obtained by Rex Downing prior to his taking possession and control of the three minor plaintiffs. (State Department Objects On Relevancy.)

3. The only notice given to adult plaintiffs of the seizure of their children was be (sic) a telephone call to John Pleasant Sims on his job by the school principal.

4. The first hearing afforded plaintiffs after seizure of the three minor plaintiffs on March 25, 1976, was that of May 5, 1976, before Honorable John V. Singleton, Jr. who ordered return of the three minor plaintiffs to the adult plaintiffs.

5. The names of all the plaintiffs now appear as perpetrators and/or victims of child abuse in a

Central Registry by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (the date of initial seizure of the three minor plaintiffs) and May 5, 1976 (the date on which minor plaintiffs were ordered restored to adult plaintiffs by this Court), although no judicial finding of any such abuse has been made.

6. That John Pleasant Sims and Mary Carter Sims were required by the Harris County Child Welfare Department to attent (sic) counseling sessions under Doctors Blair and Rita Justice at the Southwest Institute for Group and Family Therapy.

Defendants' Contested Issues of Fact

1. The doctor who examined Paul Sims on March 25, 1976 concluded that Paul was a physically abused child.

2. On March 25, 1976, Rex Downing reached a reasonable conclusion that John and Mary Sims were responsible for the physical injuries to Paul Sims.

3. On March 25, 1976, Rex Downing reached a reasonable conclusion that the health and physical safety of Paul Sims was threatened.

4. Rex Downing acted under the Family Code in good faith in making decisions concerning Paul Sims.

5. On March 25, 1976, the doctor who examined Shawana and Sabrina Sims found bruising on the buttocks of both children.

6. On March 25, 1976, Rex Downing reached a reasonable conclusion that John and Mary Sims were responsible for the bruising on Shawana and Sabrina Sims.

7. Rex Downing acted under the Family Code in good faith in making decisions and recommdnations (sic) concerning Sabrina and Shawana Sims.

8. On March 27, 1976, Paul Sims was admitted to the hospital as a result of injuries sustained from physical punishment administered by his parents on March 24 and 25, 1976.

9. Gene Lege, Director of Harris County Child Welfare Unit, is appointed managing conservator in all cases involving child abuse arising in Harris County, where court proceedings ensue.

10. Gene Lege had a de minimus contact with the case involving the Sims children.

11. Gene Lege acted in good faith in the minimal contacts he had with the Sims case.

12. All agents and employees of the State Department of Public Welfare who are defendants in this cause acted in good faith and in the interest of the welfare of the Sims children during the course of actions taken under the Family Code herein.

13. Child abuse is a significant social problem in Texas.

PLAINTIFFS (sic) EVIDENCE

1. Petition in Cause No. 38,295, 'Suit for Protection of Child in Emergency', pursuant to Chapter 17, Texas Family Code.

2. Petition in Suit Affecting Parent-Child Relationship, Cause No. 38,295.

3. 'Show Cause Order' in Suit Affecting the Parent-Child Relationship, Cause No. 38,295.

4. Subpoena for witness in Cause No. 1,069,341, Brooks.

5. Subpoena for witness in Cause No. 1,069,341, Rhea.

6. Subpoena for witness in Cause No. 1,069,341, Mertens.

7. Subpoena for witness in Cause No. 1,069,341, Mrs. Melvin Jones.

8 & 10. Petition, Order For Hearing, and Order of Writ of Habeas Corpus in Cause No. 1,069,341. Sheriff's service of writ upon Gene Lege.

9. Docket sheet in Cause No. 1,069,341.

11, 12 & 13. Central Record Files showing that the minor plaintiffs had not been the subjects of a suit affecting the parent-child relationship, dated April 14, 1976.

14. Letter, showing Instruments transferred from Juvenile Court of Harris County, Texas to the Juvenile Court of Montgomery County, Texas.

15. Order of Transfer in Cause No. 38,295, Order in Suit For Protection of Child in Emergency.

16. Cause No. 3,030, from Juvenile Court of Montgomery County, Texas, showing receipt of Cause No. 38,295 from Harris County, Texas.

17. Docket Sheet in Cause No. 38,295.

18. Motion to Modify in Cause No. 38,295.

19. Order to Modify in Cause No. 38,295.

20. Letter from the 14th Court of Civil Appeals denying Relator's motion for leave to file petition for writ of habeas corpus for lack of jurisdiction.

20a. Complete file from 14th Court of Civil Appeals regarding the Sims.

21. Cause No. 3,090, 'Suit Affecting the Parent-Child Relationship as to minor plaintiff, Paul Edward Sims, filed in the Juvenile Court of Montgomery County, Texas, on the 14th day of May, 1976.

22. Ex Parte Writ of Attachment for Paul Edward Sims, issued on the 14th day of May, 1976, by Judge Ernest A. Coker.

22a. Docket Sheet in Cause No. 3,090, Montgomery County, Texas.

23. Temporary Restraining Order issued by Judge John V. Singleton on the 21st day of May, 1976.

24. Order of Preliminary Injunction, entered by the Three-Judge Panel on the 18th day of June, 1976.

25. Texas Department of Public Welfare 'CANRIS REPORT' incident number A061353, involving all the plaintiffs, showing date abuse occurred as 3/25/76.

26. Texas Department of Public Welfare 'CANRIS REPORT' showing date abuse occurred as 5/05/76.

27. CANRIS REPORTS, bearing deletions, same as numbers A061353 and A066060, attached to Raymond Vowell's answer to Interrogatory No. 10.

28. Dr. Maire (sic) Surgi's hand written narrative report, regarding the minor plaintiffs, received from the State Department on or about September 2, 1976.

29. Dr. Marie Surgi's hand written narrative report regarding all plaintiffs, and letter from Jan Connerman, counsel for Dr. Surgi, received October 2, 1976.

30. Hospital records from St. Joseph's Hospital of Paul Edward Sims, from March 27 through April 7, 1976. (Stipulated)

31. Duplicate Card, showing Mrs. Rhea's report of paddling of Paul Edward Sims.

32. Article Four, Sections 473.100, 473.120 and 473.130 of Houston Independent School District Procedures, and Houston Independent School Reporting For for (sic) Child Abuse and Neglect.

33. Transcript of Zoe Martin.

DEFENDANTS (sic) EVIDENCE

1. Case notes of Rex Downing on the Sims family from March 25, 1976 through May 10, 1976. (Stipulated)

2. Medical records of Dr. Marie Surgi on the Sims children on March 25, 1976. (Stipulated)

3. Medical records of Dr. Jesus Diaz on Paul Sims from March 27, 1976, through April 7, 1976. (Stipulated)

4. Hospital records on admission of Paul Sims to St. Joseph's Hospital from March 27, 1976, through April 7, 1976. (Stipulated)

5. Psychological Evaluation by Comprehensive Series for Education (Ann Stanton) of Paul Edward Sims done on May 4, 1976. (Affidavit)

6a, b & c. Photographs of Paul Edward Sims' injuries taken by Rex Downing at Harris County Child Welfare on March 25, 1976.

7. Two photographs of Paul Edward Sims' injuries taken by Houston Police officer R.G. Hickman at St (sic) Joseph's Hospital on March 27, 1976.

8. Records of counseling by Dr. Blair Justice.

9. Records of counseling by Dr. E. E. Johnstone. (Stipulated)

10. Statistical Summaries of Incidents of Child Abuse in Texas.

11. Illustrative material on child abuse.

WITNESSES

PLAINTIFFS WOULD CALL THE FOLLOWING WITNESSES:

1. JOHN PLEASANT SIMS, Rt. 3, Box 1304, Conroe, Texas. Adult plaintiff; will testify as to the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

2. MARY CARTER SIMS, Rt. 3, Box 1304, Conroe, Texas. Adult plaintiff; will testify as to the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

3. SABRINA MARIE SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiff; will testify as to her knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

4. PAUL EDWARD SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiff; will testify as to his knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure. Paul will also testify that his teacher, Mrs. Theresa Rhea, paddled him along with other classmates on March 25, 1976, at a time after his father John Sims had left the school.

5. SHAWANA EVETTE SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiffs will testify as to her knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

6. ZOE MARTIN, Deputy Clerk, Juvenile Court, Harris County Family Law Center. Will bring records and testify thereto of Case Numbers 38,295 and 1,069,311 involving all plaintiffs filed in the Juvenile Court, Harris County, Texas. (Transcript).

7. R. J. GRAY, Deputy Clerk, Montgomery County District Court, Conroe, Texas. Will bring all records and testify thereto of Case Numbers 3,030 and 3,090 involving all plaintiffs filed in the Juvenile Court, Montgomery County, Texas. (Stipulated).

8. ROBERT LOWRY, Judge, Juvenile Court, Harris County, Texas. Will testify to all court proceedings involving all plaintiffs filed in the Juvenile Court of Harris County, Texas. (Subpoena).

9. CAROL JONES, 1700 North Loop East, Houston, Texas. Will testify that she is the Petitioner in Cause No. 3,090 involving minor plaintiff Paul Sims, filed in the Juvenile Court of Montgomery County, Texas. (Adverse Witness). (Stipulated).

10. REX DOWNING, 2913 Louisiana, Houston, Texas.Mr. Downing will testify that he recommended termination of the parent-child relationship as to Paul Sims and the adult plaintiffs. (Adverse witness).

11. GLORIA JONES, 800 Ringold Street, Houston, Texas. Will testify as to her knowledge of the condition of the minor plaintiffs on March 25, 1976, and her participation in report of child abuse, and events following thereafter. (Adverse Witness).

12. THERESA J. RHEA, 1212 Nashau Street, Houston, Texas. Paul Sims' teacher on March 25, 1976. (Adverse Witness).

13. DR. EULA FAYE PERRY, 3502 Liberty Road, Houston, Texas. Dr. Perry will testify about her examination and treatment of the Sims children after March 25, 1976. (Stipulated).

14. INEZ HARRIS, 800 Ringold Street, Houston, Texas. School nurse; will testify as to her participation in treating Paul Sims on March 25, 1976 and May 10, 1976.

21. RAYMOND VOWELL, Commissioner of the State Department of Public Welfare of the State of Texas, with offices in Austin, Travis County, Texas. (Adverse Witness).

DEFENDANTS WOULD CALL THE FOLLOWING WITNESSES:

1. REX DOWNING, 2913 Louisiana, Houston, Texas. Mr. Downing will testify about the casework he did concerning the Sims family. (Stipulated).

2. DR. MARIE SURGI, 4040 Milam, Houston, Texas. Dr. Surgi will testify about her knowledge of Paul Sims' injuries on March 25, 1976, including the paddling administered by Mr. John Sims. (Stipulated).

3. THERESA RHEA, Osborne Elementary School, 800 Ringold, Houston, Texas. Ms. Rhea will testify about her knowledge of Paul Sims' injuries on March 25, 1976, including the paddling administered by Mr. John Sims.

4. DR. JESUS DIAZ, Suite 1116, St. Joseph Professional Building, 2000 Crawford, Houston, Texas. Dr. Diaz will testify about the medical condition of Paul Sims from March 27, 1976 through April 7, 1976. *(Stipulated)*

5. DRS. BLAIR & RITA JUSTICE, 5925 Kirby Drive #221, Houston, Texas. Drs. Justice will testify about the psychological condition of Mr. and Mrs. Sims.

6. DR. E.E. JOHNSTONE, 1300 Moursund, Houston, Texas. Dr. Johnstone will testify about the need of Mr. and Mrs. Sims for continued conseling on their parenting skills. (Stipulated).

7. DR. EULA FAYE PERRY, 3502 Liberty Road, Houston, Texas. Dr. Perry will testify about her examination and treatment of the Sims children after March 25, 1976. *(Stipulated)*

8. JUANA FALCON, 1300 Moursund Street, Houston, Texas. (TRIMS). Medical Records Clerk.

9. MS. BOBBIE MATTHEWS, John H. Reagan Building, Austin, Texas. Ms. Matthews will testify regarding data about child abuse in Texas.

10. MS. KAY LOVE, John H. Reagan Building, Austin, Texas. Ms. Love will testify regarding data about child abuse in Texas.

11. DR. JOAN HEBELER, 207 Barracuda, Galveston, Texas. Dr. Hebeler will testify about the medical aspects of child abuse.

12. DR. AUGUST R. TAROSI, 1203 Missouri, Houston, Texas. Dr. Tarosi will testify about the Comprehensive Services for Education Psychological Evaluation of Paul Sims.

EXPERT WITNESS
SUMMARY OF QUALIFICATIONS

NAME: Joan Rochelle Hebeler, M.D. DATE: October 19, 1976

PRESENT POSITION AND ADDRESS:

Associate Professor
Department of Pediatrics
University of Texas Medical Branch
Galveston, Texas 77550

BIOGRAPHICAL:

Birth Date:	April 30, 1934
Birth Place:	Independence, Missouri
Marital Status:	Single
Home Address:	207 Barracuda Galveston, Texas 77550

EDUCATION:

1955	B.A., University of Wisconsin, Madison, Wisconsin
1958	M.D., University of Wisconsin, Madison, Wisconsin
1958-59	Internship, Rotation, University of Texas Medical Branch, Galveston, Texas
1959-61	Resident, Department of Pediatrics, University of Texas Medical Branch, Galveston, Texas
1961-62	Chief Resident, Director of Pediatrics; Fellow (6 months in Pediatric Cardiology and 6 months in Pediatric Menatology), University of Texas Medical Branch, Galveston, Texas
Aug. 1962	Fellow in Child Development, University of Texas
June 1963	Medical Branch, Galveston, Texas

MEMBERSHIP IN SCIENTIFIC SOCIETIES:

American Academy of Pediatrics
Child Development, American Academy of Pediatrics, Member
American Medical Association
Texas Medical Association
Texas Pediatric Society
Galveston County Medical Society
Ambulatory Pediatric Association
Chairman of Committee Adoption and Dependent Care - Texas Academy of Pediatrics, 1976

ADDITIONAL INFORMATION:

1964 - Certified by American Board of Pediatrics
Fluent in Spanish

APPENDIX L

LIST OF STATES' CANRIS STATUTES FROM TRENDS IN CHILD ABUSE AND NEGLECT REPORTING STATUTES REPORT NO. 95 EDUCATION COMMISSION OF THE STATES CHILD ABUSE PROJECT

TRENDS IN CHILD ABUSE AND NEGLECT REPORTING STATUTES

Report No. 95

From the ECS Child Abuse Project

Education Commission of the States
Denver, Colorado 80295
Warren G. Hill, Executive Director

January 1977

Additional copies of this report may be obtained from the Education Commission of the States, 300 Lincoln Tower 1860 Lincoln Street, Denver, Colorado 80295 (303) 893-5200
For each report send $2.00. This price includes postage and handling. Prepayment required.

APPENDIX B

STATE REPORTING STATUTES

State	Last Amended	Citation
Alabama	1975	ALA. CODE tit. 27 sec. 20-25 (1975 Interim Supp.)
Alaska	1971	ALAS. STAT. 47.17.010 - .070; (1975 Cum. Supp.)
Arizona	1970	ARIZ. REV. STAT. sec. 8-546 - 8-546.04; 13-842.01 (1975 Supp.)
Arkansas	1975	ARK. STAT. ANN. sec. 42-807 - 42-818 (1975 Cum. Supp.)
California	1974	CAL. PENAL CODE sec. 11110; 11160.0-11162; HEALTH AND SAFETY CODE sec. 306.6; WELF. AND INSTITUT. CODE sec. 18950-18962 (1975 Cum. Supp.)
Colorado	1975	COLO. REV. STAT. ANN. sec. 19.10-101-19.10-115 (1975 Cum. Supp.)
Connecticut	1975	CONN. GEN. STATS. ANN. sec. 17-38a-17-38e (1975 Cum. Supp., as amended by PA 76-27, 1976)
Delaware	1971	DEL. CODE ANN. tit. 16, sec. 901-909, (1975 Cum. Supp., as amended by HB 1111, 1976)
District of Columbia	1966	D.C. CODE sec. 2-161-20166; 16-2301(9), (1973 Edition)
Florida	1975	FLA. STAT. ANN. sec. 827.07 (1-13) (1975 Cum. Supp., amended 1976, HB 3940)

Georgia	1975	GA. CODE ANN. sec. 74-111 (reporting); sec. 99-4301-4304 (confidentiality of records) (1976 Cum. Supp.)
Hawaii	1975	HAWAII REV. STAT. sec. 350-1-350-5; 346-1 (def.) (1975 Supp.)
Idaho	1973	IDAHO CODE sec. 16-1601-1629; (1976 Cum. Supp.)
Illinois	1975	ILL. STAT. ANN. tit. 23, sec. 2051-2061 (Smith-Hurd, 1975 Cum. Supp.)
Indiana	1971	BURNS IND. STATS. ANN. (code edition) sec. 12-3-4.1-1 - 12-3-4.1-6 (1976 Cum. Supp.)
Iowa	1974	IOWA CODE ANN. sec. 235A.1-235A.24; 232.2(15) (def. of neglect; not reportable) (1975 Cum. Supp.)
Kansas	1975	KAN. STAT. ANN. sec. 38-716-38-724 (1975 Cum. Supp.)
Kentucky	1972	KY. REV. STAT. ANN. sec. 199.335; 199.990 (7 & 8) (penalties); 199.011 (6) (def.: "abused or neglected child") (Baldwin's 1975 Repl. Vol.)
Louisiana	1975	LA. REV. STAT. ANN. sec. R.S.: 14:403 (A-1); 46:52(16); 46:65 (West's, 1975 Cum. Supp.)
Maine	1975	ME. REV. STAT. ANN. tit. 22, sec. 3851-3860 (1975 Cum. Supp.)
Maryland	1975	MD. ANN. CODE art. 27, sec. 35A(a-i) (1976 Cum. Supp.)
Massachusetts	1973	MASS. ANN. LAWS ch. 119, sec. 51A-G (1975 Cum. Supp.)

Michigan	1975	MICH. STATS. ANN. sec. 25.248(1) - 25.248(16) (1976 Cum. Supp.)
Minnesota	1975	MINN. STAT. ANN. sec. 626.556(1) - 626.556(11); 260.015(10) (definition) (1975 Cum. Supp.)
Mississippi	1975	MISS. CODE sec. 14.21.5 - 14.21.27 (1972 Annotation, 1976 Cum. Supp.)
Missouri	1975	MO. ANN. STAT. sec. 210.110 - 210.165 (Vernon's, 1975 Cum. Supp.)
Montana	1974	MONT. REV. CODES sec. 10.1300 - 10-1322 (1975 Cum. Supp.)
Nebraska	1975	NEB. REV. STAT. sec. 28-1501-1506 (1974 Supp., added by LB 20, Acts of 1975)
Nevada	1975	NEV. REV. STAT. sec. 200.501-508; 432.090-432.130 (1975 Supp.)
New Hampshire	1975	N.H. REV. STAT. ANN. sec. 169:37 - 45 (1973 Supp.)
New Jersey	1974	N.J. STAT. ANN. sec. 9:6-8.8-8.32 (1975 Cum. Supp.)
New Mexico	1975	N.M. STAT. ANN., sec. 13-14-1 - 13-14-3; 13-14-14.1 - 13-14-33; 13-14-25(G), 13-14-43 (1976 Supp.)
New York	1974	N.Y. FAM. CT. ACT tit. 6, sec. 411-428; art. 10, sec. 1012 (McKinny Supp., 1975, as amended by S.10034, 1976)
North Carolina	1975	N.C. GEN. STAT. sec. 110-115 - 110-122; 8-53.1; 7A-278 (1975 Cum. Supp.)
North Dakota	1975	N.D. CENT. CODE sec. 50-25.1-01 - 50-25. 1-14; 27-20.02(5) (1975 Cum. Supp.)

Ohio	1975	OHIO REV. CODE ANN. sec. 2151.031; 04; 2151.05; 2919.22; 2151.421; 2151.27; 2151.31; 2151.33; 2151.53; 2151.281; 2151.351 (Page's 1975 Cum. Supp.)
Oklahoma	1975	OKLA. STAT. ANN. tit. 21, sec. 845-848 (1975 Cum. Supp.)
Oregon	1975	ORE. REV. STAT. sec. 418.740 - 775; 990 146.750, 760, 780 (1975 Supp.)
Pennsylvania	1975	PURDON'S PA. STAT. ANN. tit. 11, sec. 2101 - 2126 (1975 Cum. Supp., as amended by SB 25, Acts of 1975, No. 124)
Rhode Island	1975	R.I. GEN. LAWS sec. 11-9-3; 11-9-5; 11-9-5.1; 11-9-5.2; 14-1-3(H); 40-11-1 - 40-11-16 (1975 Supp., as amended by HB 7525, 1976)
South Carolina	1974	S.C. CODE ANN. sec. 15-1103(11) (neglected child); 20-310 - 20-310.6; 31-61 (abandoned or abused child) (1975 Cum Supp.)
South Dakota	1975	S.D. COMP. LAWS ANN. 26-8-6; 26-10-1; 26-10-15 (1976 Supp.)
Tennessee	1975	TENN. CODE ANN. ch. 37, sec. 1201 - 1212; 101 (def.) (1975 Cum. Supp.)
Texas	1975	VERNON'S TEX. CODES ANN. Family Code; sec. 34.01-34.08; 35.04; Civil Code: art. 2330 (1975 Cum. Supp.)
Utah	1975	UTAH CODE ANN. sec. 55-16-1-55-16-7 (1975 Supp.)
Vermont	1974	VT. STAT. ANN. tit. 13, sec. 1351-1356 (1976 Cum. Supp., as amended by S.148, 1976)
Virginia	1975	CODE OF VA. tit. 63.1, sec. 248.1-248.17 (1950 ed., 1976 Supp., as amended 1976)

Virgin Islands	1970	VIRG. IS. CODE ANN. tit. 19, sec. 171 - 176 (1975 Cum. Supp.)
Washington	1975	WASH. REV. CODE ANN. sec. 26.4-1.010 -26.44.110; 26.37.020; 26.37.040 (1975 Supp.) WASH. ADMIN. CODE sec. 388-16-500-388-16-545 (1975 Supp., as amended by ch. 217, Laws of 1975)
West Virginia	1970	W. VA. CODE ch. 49, sec. 1-3; 6A-1 - 6A-4 (1976 Cum. Supp.)
Wisconsin	1975	WISC. STATS. ANN. sec. 48.981; 905.04 (4)(e) (1975 Cum. Supp.)
Wyoming	1971	WYO. STAT. ANN. sec. 14-28.7-14-28.13 (1975 Cum. Supp.)

APPENDIX M

FOOTNOTE 70 TO CANRIS: AN INVASION OF PRIVACY? AN UNPUBLISHED PAPER BY STUART R. SCHWARTZ, A LAW STUDENT AT SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW

Footnote 70 to *CANRIS: AN INVASION OF PRIVACY?*, an unpublished paper by Stuart R. Schwartz, a law student at Southern Methodist University School of Law

70. The Department of Child Welfare handles a typical neglect and abuse report in the following manner:

> Reports of children in need of protection are first received by a case intake worker who is responsible for gathering all information from the complaintant-reporter. In Texas any person having cause to believe that abuse or neglect has occurred is required to report, *Tex. Fam. Code Ann.* § 34.01 (Vernon 1975), and failure to do so constitutes a Class B misdemeanor. *Id.* at §34.07 (Vernon Supp. 1978). The complaintant may, however, remain anonymous, *Id* at § 34.02(d) (Vernon, 1975), and, in any event, his identity will not revealed to the parents. Social Service Handbook §7222 (Jan. 1978).

The information is transferred to a CANRIS report form where the case worker records the child's name, as well as the name of his siblings and parents, states the nature of the report (either child abuse or neglect or both) and decides on the role each individual played in the reported offense. The worker has a choice of selecting from five different role classifications: victim, perpetrator, unknown, uncertain, or not involved. *Id.*, Form 2202-A Children's Protective Services Intake and CANRIS report, Parts 1 & 2, with Instructions (April, 1976).

Thereafter, a report and inquiry is made to CANRIS to determine whether any previous report exists on any or all of the family members reported. *Id.* at §7222 (Jan. 1978). An inquiry cannot be made to CANRIS unless a report is also made.

Furthermore, the worker himself does not have access to the CANRIS terminal. Instead, he must contact the nearest designated telecommunications terminal and have an authorized CANRIS operator make the inquiry for him. *Id.* at §7222.1 (Jan. 1978). From this inquiry, the computer prints a feedback report which is then mailed to and retained by the worker for future updating, correcting or filing. *Id.*

After the initial investigation, the case worker amends and updates his prior determination of individual involvement by choosing from five "dispositions" classifications: Validated, Invalidated, Uncertain, Potential Identified, or Family Moved. Id at §7223 (Jan. 1978). If the report is found invalid, the CANRIS report will be automatically expunged from the computer files six months after the date the report is finalized. Otherwise, the report is not removed until the youngest child reported in the case reaches age eighteen. *Id* at § 7222-1 (Jan. 1978).

The Susman and Cohen Model Act is much more explicit in its handling of incoming reports. The Model Act calls for the use of only three role labels: Suspected, Unfounded, or Indicated. All initial reports must be labelled Suspected and can be maintained no longer than sixty days. On or before the expiration date, they must be converted into either Unfounded or Indicated reports. Indicated reports are maintained on the register only if accompanied with supplemental information available to the agency. If insufficient evidence exists, the report is classified as Unfounded and any information gained from such reports is immediately expunged. The Model Act calls for expungement of Indicated reports seven years from the date the report was received. *A. susman & S. Cohen, Reporting Child Abuse and Neglect.* 7 (1975).

APPENDIX N

SOCIAL SERVICES HANDBOOK REGULATIONS

SSHR 53/OCTOBER 1975
§1722 — Protective Services
SSHR 57/DECEMBER 1975
§7311 — Supervisory Approval for Removal of Child
§7312 — Emergency Removal
§7330 — Work with the Court
§7338 — Termination of the Parent-Child Relationship
§7338.2 — Involuntary Termination

1722 Protective Services

In addition to the general guidelines in Items 1720 and 1721, regarding AFDC recipients receiving social services, the following guidelines apply to protective services cases:

1. Form 206, Intake Report Children and Protective Services, must be completed for every protective services report or complaint received by the Department to record and document the report or complaint.

2. If an investigation is not made immediately upon receipt of a complaint or report, document why in the narrative.

3. Events of the investigation and findings should be thoroughly documented in the narrative at the time of their occurrence. Care should be taken to differentiate between facts which can be documented and impressions or assessments which are not proven. Narrative recording should include:

   a. The clarification of the complaint (see Item 7221),

   b. The circumstances of the investigation (see Item 7223),

   c. Assessments, interpretations, and the validity or invalidity of abuse, neglect etc. (see Item 7228),

   d. Case planning, to include the reasoning behind the decision to leave a child with his family or to remove a child from his home (see Item 7223),

   e. Case activity necessary to account for the Department's intervention in the case (see Item 7223), and

f. Documentation (by recording in the narrative or filing medical statements in the record) of medical and psychological/psychiatric exam or why these exams were not obtained (see Item 7223).

4. If work with the family is to continue after the investigation, forms and narrative recording must be kept current. Case narrative recording should give a complete picture of the family, of case action and of the continuing need for protective services. The validity of the events not recorded in the case record at the time of their occurrence may be questioned by the court. The narrative should include:

a. Why the case is open,

b. What the Department is trying to accomplish with the family and child (case plan) (see Item 7231 for details of the case plan),

c. Family action in response to the mutually determined case plan,

d. The services given to the child and family, including frequency of worker contact with family and child,

e. Periodic evaluations of accomplishments and unachieved objectives,

f. Why the child is remaining in the home or being placed out of the home,

g. If the child is removed from the home,

(1) Legal base for removal, to include as appropriate:

(a) The "reasonable cause" of the worker's action in emergency removal (see Item 7312),

(b) Worker's findings that substantiate the existence of one or more conditions under termination of the parent-child relationship (see Item 7338),

(c) The circumstances of the action taken in securing an affidavit of relinquishment (see Item 7338.3),

(d) Reasons for and meeting of criteria for voluntary placement (see Item 7511),

(2) Supervisory approval for removal,

(3) Parent's participation in plans for the child,

(4) the events leading to and the circumtances of the removal,

(5) Recommendation to the court and the court's response to the Department's petition or report and the basis for the court's response, especially if it differs from the Department's request, and

(6) The Department shall obtain from the court a written copy of the court order giving responsibility for placement and care of the child to the Department. Copies of the petition, witnesses' reports or statements, court orders, birth certificate or other legal documents must be filed in the child's case record.

5. The CANRIS reporting (Form 202), the social services management reporting system (Forms 281 and 282) and case narrative recording (indicating continuing need and therefore eligibility) must be kept current on cases to substantiate and document the Department's requests for Federal and State funding for protective services.

7311 Supervisory Approval for Removal of Child

No child should be removed from his home by the Department without the approval of a supervisor who has a graduate social work education or who has been delegated the authority to make this decision by a staff member with a graduate social work education.

7312 Emergency Removal

When a decision is made to remove the child on an emergency basis before a court order can be obtained and without consent or knowledge of the parents, emergency removal is made possible by the Texas Family Code, which states that, "An authorized representative of the State Department of Public Welfare, a law enforcement officer or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction. . . . The child shall be delivered immediately to the court." TEX. FAM. CODE §17.01. No child shall be removed from his home without supervisory approval. If no supervisor is available, approval at the program director level is required. When possible, a law enforcement officer should accompany the worker when he removes the child from his home. When emergency removal is necessary, the rights of the parents are respected.

The Texas Family code stipulates that the worker may remove a child without civil liability if that worker has reasonable cause, at the time possession was taken, to believe there was an immediate danger to the physical safety or emotional well-being of the child. See TEX. FAM. CODE § 17.09. Concrete facts should exist to illustrate and support the worker's beliefs.

After emergency removal, the worker will ". . .file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child." This hearing may be held without notice. See TEX. FAM CODE § 17.02, 17.03.

In accordance with § 17.04 of the Texas Family Code, the court may decide that the child is in need of immediate protection and make any appropriate order for the care and protection of the child.

7330 Work with the Court

When the determination has been made that the Department will ask the court for managing conservatorship of a child, a petition for a suit affecting the parent-child relationship is prepared and filed, usually by the district or county attorney with the assistance of the worker. If the county or district attorney refuses to file a petition, the regional attorney may be consulted for assistance in developing the case, so that, if appropriate, the county or district attorney can be approached with a request to reconsider.

If the Department does not have sufficient time to seek court action prior to emergency removal of a child from his home, the worker will deliver the child to the court and file a petition at that time as outlined in Item 7312, Emergency Removal. The contents of the petition are

stated in Section 11.08 of the Texas Family Code. In its petitions, the Department should be named as requesting conservatorship and should be represented by the unit supervisor or program director who should sign the petition.

The court sets a date for the conservatorship hearing and may appoint an attorney and/or guardian ad litem to represent the child. TEX. FAM. CODE § 11.10. In a suit to terminate the parent-child relationship, the court must appoint a guardian ad litem to represent the interests of the child. The court issues citations and arranges for them to be served from information supplied by the worker. The worker should seek to know and anticipate the specific practices and preferences for forms and additional requirements in the court with which he works in order to expeditiously meet these requests and obtain a ruling on the case.

The court is entitled to the Department's total case and fiscal records on families and children the Department is serving who are under the continuing jurisdiction of the court.

7338 Termination of the Parent-Child Relationship

chapter 15 of the Texas Family code provides three procedures for termination of the parent-child relationship:

1. Termination when the parent is the petitioner;
2. Involuntary termination; and
3. Affidavit of voluntary relinquishment of parental rights.

Voluntary or involuntary termination is incomplete without judicial action. A decree terminating the parent-child relationship divests the parent and the

child of all legal rights, privileges, duties and powers with respect to each other except that the child retains the right to inherit from the parents unless the court otherwise provides. TEX. FAM. CODE § 15.07.

7338.2 Involuntary Termination

A petition by the Department requesting termination of the parent-child relationship may be granted if the court finds termination is in the best interest of the child and the parent has: (TEX. FAM. CODE § 15.02)

1. Voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return, or
2. Voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months, or
3. Voluntarily left the child alone or in the possession of another not the parent and, although expressing an intent to return, failed to do so without providing adequate support of the child and remained away for a period of at least six months, or
4. Knowingly placed or allowed the child to remain in conditions or surroundings which endanger his physical or emotional well-being, or
5. Failed to support the child in accordance with his ability during a period of one year ending within six months of the date of the filing of the petition, or
6. Abandoned the child without identifying the child or furnishing means of identification, and child's identity cannot be ascertained by the exercise of reasonable diligence, or

7. Voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during the pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth; or

8. Refused to submit to a reasonable and lawful order of a court under Section 34.05 of the Texas Family code (relating to an investigaton of child abuse), or

9. Has been the major cause of:

   a. The failure of the child to be enrolled in school as required by the Texas Education Code; or

   b. The child's absence from his home without the consent of his parents or guardian for a substantial length of time or without the intent to return; or

10. Executed before or after the suit is filed an unrevoked or irrevocable affidavit of relinquishment of parental rights.

A petition to terminate the parent-child relationship may be filed any time after the first trimester of the mother's pregnancy. No hearing may be held and no order may be filed other than temporary orders until the child is at least five days old. TEX. FAM. CODE 15.021.

Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 78-6

* * *

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,

Appellants

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

VOLUME IV

APPENDIX TO JURISDICTIONAL STATEMENT

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

On Appeal From The United States District
Court For The Southern District Of Texas
Houston Division

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APPENDIX O

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES. ANSWERS TO INTERROGATORIES NOS. 5, 6, 7, 14, and 15, WITH ATTACHMENTS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, ET AL.	)(	
Plaintiff	)(	
VS.	)(	CIVIL ACTION NO. 75-H-120
STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS, ET AL.,	)(	
Defendants	)(	

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES

NOW COMES RAYMOND W. VOWELL, Commissioner of Public Welfare, Defendant in the above-styled and numbered cause and answers Plaintiff's Original Interrogatories as follows:

. . .

INTERROGATORY NO. 5. "Pursuant to the provisions of §34.06, Title 2, Texas Family Code, does your department maintain in Austin, Texas a central registry of reported cases of child abuse?"

ANSWER. Yes.

INTERROGATORY NO. 6. "If your answer to interrogatory No. 5 is in the affirmative, has your department adopted rules and regulations to carry out the provisions of §34.06, Title 2, of the Texas Family Code?"

ANSWER. Yes.

INTERROGATORY NO. 7. "If your answer to interrogatory No. 6 is in the affirmative, will you attach a copy of such regulations without a Motion to Produce?"

ANSWER. Yes. Attached hereto as exhibit "A" are section 7222 of the current Social Services Handbook, forms and instructions for the Child Abuse and Neglect Report and Inquiry System (CANRIS), and amended rules adopted by the Board of Public Welfare.

. . .

INTERROGATORY NO. 14. "For the period beginning September 1, 1975 through May 31, 1976, state the total number of reports received by the Texas State Department of Public Welfare under color or provision of §§34.01, §§34.02, Title 2, Texas Family Code, if any."

ANSWER. The Department's computerized statistical information in the CANRIS file concerns only the number of abuse/neglect reports received by the Department and reported to CANRIS. From September 1, 75 to May 31, 1976, there were 27,671 reports made to CANRIS. This is the number of reported incidents, not the number of children or families. There is generally more than one child per reported incident, and a family may be reported more than once if abuse or neglect reoccurs. Under §§ 34.02 of the Family Code the information requested would also include reports of truant and runaway children. Full information concerning these reports is available only in individual case records located in over 160 offices throughout the state and certain statistical information concerning such reports could be obtained from the Department's computerized Social Services Management (SSMS) file only by special programming.

If this is done the implementation of revisions in the SSMS system which are now being developed will be delayed by an amount of time equal to that required to do the special programming.

INTERROGATORY NO. 15. "For the total number, if any, given in your answer to interrogatory No. 14, state separately as to each such report:

a. The date and time of receipt of such report,

ANSWER. Special programming would be required to extract this information from the computerized statistical information contained in the CANRIS file. It is estimated that the special programming necessary to obtain the information requested in Interrogatories 15a, 15c, 15e and 15f would take two weeks if this programming were given priority over current assignments. If this is done the implementation of revisions in the CANRIS system which are now being developed will be delayed by an amount of time equal to that required to do the special programming.

b. Whether such report was oral or in writing,

ANSWER. This information is not included in the computerized statistical information contained in the CANRIS file. the full information requested can be obtained only by doing a desk review of child welfare cases in over 160 offices throughout the state. It is estimated that this would take a total of 25 manpower days per region and that the information gathering process would take two months if all the other requested information were gathered at the same time.

c. Whether such report was from an identified source or from an anonymous source,

ANSWER. From the inception of CANRIS on December 3, 1973 to May 31, 1976, 3,245 (or 5%) out of

65,843 initial reports had anonymous sources. The specific information requested is not currently available from existing reports. See the answer to Interrogatory 15a.

d. If same was an oral report, state whether it was made by telephone,

ANSWER. See the answer to Interrogatory 15b.

e. Whether any information received as a result of such report was placed in the "Central Registry" provided for by §§ 34.06, Title 2, Texas Family Code,

ANSWER. See the answer to Interrogatory 15a.

f. The date on which such information was placed in such Central Registry,

ANSWER. See the answer to Interrogatory 15a.

g. If any such information was placed in a central registry, state whether it has been disseminated to other registries,

ANSWER. Statistical information which does not identify individuals and which is derived from all combined reports in the CANRIS file is sent upon request to the National Study on Child Neglect and Abuse Reporting. See the answer to Interrogatory 11.

h. Whether any children were seized as a result of such report,

ANSWER. It is estimated that children are removed from their homes in only 10% of the cases in which abuse or neglect has been reported on one or more occasions. However, the specific information requested is not currently available in existing reports. Special programming would be required to extract this information from the statistical information contained

in the Social Services Management System (SSMS) file. See the answers to Interrogatories 15a and 15b.

i. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state the date and time of such seizure,

ANSWER. See the answer to Interrogatory 15h.

j. Whether any suit was thereafter filed by the State Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of such report,

ANSWER. The Department's computerized CANRIS and SSMS systems do not gather "petition filed" information except on abuse and neglect cases through CANRIS and then do not distinguish whether the material was filed under Chapters 11 or 17 of the Family Code. The CANRIS "petition filed" information is not immediately available on all CANRIS cases. Present printouts are limited to finalized validated cases, and the reports indicate only the total numbers of petitions filed with respect to twenty-three (23) distinct types of injury or abuse. Since petitions are generally filed in cases involving more than one type of injury, the currently available statistics do not provide the requested information concerning the actual number of petitions filed in relation to the number of reports received, children involved or cases being handled. Gathering the requested "petition filed" statistics on all CANRIS cases would require special programming which it is estimated could be completed within two weeks if priority were given to this assignment over other current assignments. A copy of the stistical information which is currently available is attached as Exhibit C.

k. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state whether the State Department sought termination of the parent-child relationship in such suit,

ANSWER. The full information requested can be obtained only through a desk review of child welfare cases in over 160 offices throughout the state. See the answer to Interrogatory 15b.

1. Whether any suit is pending, concluded by final trial or dismissed if such suit was filed by the State Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of any report,

ANSWER. See the answer to Interogatory 15k.

m. If your answer to the immediately preceding interrogatory is "concluded by final trial" state whether or not same resulted in termination of the parent-child relationship."

ANSWER. See the answer to Interrogatory 15k.

. . .

7222 Child Abuse and Neglect Report and Inquiry System (CANRIS)

State law requires that the Department provide a central registry of child abuse and neglect reports:

"The State Department of Public Welfare shall establish and maintain in Austin, Texas, a central registry of reported cases of child abuse or neglect. The Department may adopt rules and regulations as are necessary in carrying out the provisions of this Section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system."TEX. FAM. CODE. 34.06.

This mandate is fulfilled through the Department's Child Abuse and Neglect Report and Inquiry System (CANRIS), an automated system designed to facilitate reporting of child abuse and neglect and to collect and store confidential information in the central registry. The registry is computerized for immediate retrieval of information relating previous incidents, e.g., the type of incident, the validity of the previous reports, and the name and location of the previous worker in order to obtain the previous case record. De-identified CANRIS information is entered monthly for statistical and research purposes into a national child abuse and neglect central registry provided throught National Clearinghouse on Child Abuse and Neglect.

Reporting to and inquiring of the CANRIS system are functions limited to authorized Departmental protective services staff. Inquiries may be made by DPW Investigation Division in regard to the investigation of a child abuse or neglect case which has been referred to them. If the Investigation Division becomes aware of an unreported case of abuse or

neglect, it will refer the case to the appropriate protective services regional staff for reporting of the incident to CANRIS and coordination of the investigation.

All reports of abuse and neglect must be reported to CANRIS. Even though the case may be active at the time the report is received, the new report should be entered into the CANRIS system. An inquiry about previous incidents is to be made on all reports of abuse and neglect, unless the case is currently active and the information has already been received. When a report fo child abuse or neglect is received, the worker immediately makes a report and inquiry through CANRIS by calling a telecommunications operator. CANRIS telecommunications operators are located at terminals located throughout the State. Form 202, Child Abuse and Neglect Incident and Inquiry Report, will be printed by the computer from information supplied via the telecommunications terminal. The Form 202 will be mailed to the worker for updating, correcting or filing. Updating must be completed as follows:

1. During investigation to enter information which necessitates another inquiry;

2. Within 30 days after the receipt of the report to indicate a determination of the validity or invalidity of the occurrence of abuse or neglect;

3. As soon as a family moves, if they do so prior to the determination concerning validity;

4. As soon as court action regarding the child or family is finalized, if still pending beyond 30 days of the date of receipt of the report.

If licensing or social services staff suspect during the course of a home or licensing study that the family or individual may have been involved in an abuse or neglect situation in the past, the worker may request a CANRIS inquiry on the family or individual. The inquiry is requested by submitting a memo to the Chief Administrator, Social Services Branch State Office. The request must include specific reasons for the request, the family member's or individual's full name, birth date, sex, ethnic group and social security number.

The decision regarding intervention by the Department may be shared with an agency or professional person making the report. Protective services staff should make themselves available to physicians or professional persons in hospitals, clinics, or schools requesting to have inquiry information without making a report. The requirement to enter a report of abuse or neglect before inquiry information can be obtained should be explained to the professional person. The worker may discuss with the professional person whether the inquiry without a report would place the professional person in violation of the mandatory reporting law (see Item 7111, Child Abuse or Neglect Reporting Law). Validity of the identity of the professional person must be obtained before confidential information is released. The professional person will be helped to understand the confidential nature of the inquiry information and how t should be used in acting on the reported abuse or neglect. If the professional person declines making a report, the worker and supervisor must evaluate the possibility of abuse or neglect in the case, based on the information gained from the professional person at the time of the request for a CANRIS inquiry. If it is felt that potential danger to the child exists, a CANRIS report and further inquiry into the situation should be made by the worker.

Cases reported for truancy, runaway behavior, juveniles in need of supervision, unmarried and school-age parents are not reported into the CANRIS system unless the child's situation appears to involve abuse or neglect. If abuse or neglect is suspected to be a problem in the youth's situation, a report into CANRIS is made.

A CANRIS report will be made of a complaint or report stating that the death of a child was attributed to abuse or neglect, even if no other children remain in the home.

CANRIS information must be kept up-to-date regarding the findings of all reports made to the Department of abuse and neglect and the disposition of each case.

State of Texas
Department of Public Welfare

Form 2202-A
July 1976

CHILDREN'S PROTECTIVE SERVICES
INTAKE AND CANRIS REPORT
PART I

SECTION I - WORKER IDENTIFICATION

A

1 WORKER LAST NAME (15) | 2 FIRST NAME (10) | 3 MI | 4 CANRIS INCIDENT NO | DATA PROCESSING ONLY

5 EMP NO | 6 BJN | 7 MAIL CODE | 8 SPY | 9 UD | 10 SECURITY | RUN DATE / /

SECTION II - INCIDENT REPORT

B

11 DATE OCCURRED TO CHILD / / | 12 DATE REPORTED TO DPW / / | 13 TIME REPORTED TO DPW : A M P M | 14 | TP OPERATOR ONLY

C

15 REPORTED INCIDENT TYPE A ☐ N ☐ B ☐ | 16 REPORT METHOD PHONE ☐ MAIL ☐ | 17 SOURCE OF REPORT | 18 | REPORT KEYED BY | DATE REPORT KEYED / /

SECTION III - INDIVIDUAL INFORMATION

19 LN NO | 20 LAST NAME | 21 FIRST NAME | 22 MI | 23 BIRTHDATE / / | 24 AGE | 25 SEX | 26 ETH | 27 REL SHIP | 28 SSMS | 29 ROLE

30 STREET ADDRESS | 31 CITY | 32 ST | 33 ZIP CODE | 34 CNTY | 35 SNDX REQ

36 DPW CLIENT NO | 37 SOCIAL SECURITY NO | 38 LA | 39 CONS | 40 CA | 41 ABUSE TYPE | 42 NEGLECT TYPE | 43 FYL | 44 PREV INC NO | 45 LINE

19 LN NO | 20 LAST NAME | 21 FIRST NAME | 22 MI | 23 BIRTHDATE / / | 24 AGE | 25 SEX | 26 ETH | 27 REL SHIP | 28 SSMS | 29 ROLE

30 STREET ADDRESS | 31 CITY | 32 ST | 33 ZIP CODE | 34 CNTY | 35 SNDX REQ

36 DPW CLIENT NO | 37 SOCIAL SECURITY NO | 38 LA | 39 CONS | 40 CA | 41 ABUSE TYPE | 42 NEGLECT TYPE | 43 FYL | 44 PREV INC NO | 45 LINE

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30 STREET ADDRESS | 31 CITY | 32 ST | 33 ZIP CODE | 34 CNTY | 35 SNDX REQ

36 DPW CLIENT NO | 37 SOCIAL SECURITY NO | 38 LA | 39 CONS | 40 CA | 41 ABUSE TYPE | 42 NEGLECT TYPE | 43 FYL | 44 PREV INC NO | 45 LINE

19 LN NO | 20 LAST NAME | 21 FIRST NAME | 22 MI | 23 BIRTHDATE / / | 24 AGE | 25 SEX | 26 ETH | 27 REL SHIP | 28 SSMS | 29 ROLE

30 STREET ADDRESS | 31 CITY | 32 ST | 33 ZIP CODE | 34 CNTY | 35 SNDX REQ

36 DPW CLIENT NO | 37 SOCIAL SECURITY NO | 38 LA | 39 CONS | 40 CA | 41 ABUSE TYPE | 42 NEGLECT TYPE | 43 FYL | 44 PREV INC NO | 45 LINE

SECTION IV - FINALIZING INFORMATION

D

46 FINDINGS | 47 DISP | 48 CRIM ACT | 49 AWOL INC | 50 GCC | 51 DATE FINALIZED / / | NON CANRIS ONLY: 52 FINDINGS | 53 DISP | 54 | 55

62 PAGE _____ OF _____ PAGES (PART I ONLY)

64 WORKER SIGNATURE

State of Texas
Department of Public Welfare

Form 2202-A
July 1976
Page 2

INTAKE SUPPLEMENT
(PART II, CHILDREN'S PROTECTIVE SERVICES: INTAKE AND CANRIS REPORT)

PRESENTING PROBLEMS: Describe alleged abuse, neglect, truancy, runaway, unmarried or school age parent, court-ordered social study, out-of-town inquiry (OTI), etc.

Is the child in danger of being permanently harmed or losing his life? ☐ Yes ☐ No ☐ Possibly

Has a doctor seen the child? ☐ Yes ☐ No Name of Doctor _____

Date seen / / Treatment

Is immediate removal/placement of the child needed? ☐ Yes ☐ No ☐ Possibly

Reasons

COMPLAINANT: Name | Relationship to Child

Street Address | City | State | Zip | Telephone

Present/Previous Case, Local Records _____

CANRIS Soundex Information _____

ACTION TAKEN

WORKER RECOMMENDATION	SUPERVISOR DECISION
Continued protective services needed? ☐ Yes ☐ No	Assigned for continued protective services?
Reason _____	Yes ☐ Worker Assigned _____
_____	No ☐ Reason _____
Date	Supervisor / Date

FORM 2202-A
Instructions

CHILDREN'S PROTECTIVE SERVICES INTAKE AND CANRIS REPORT

PURPOSE

1. To standardize the collection and recording of intake information of children's protective services cases.

2. To serve as case record documentation of the client's eligibility for protective services for children.

3. To serve as a reporting form for the Child Abuse and Neglect Reporting and Inquiry System (CANRIS) as mandated by the State Legislature.

4. To provide the DPW protective services worker with a computer printout of a new incident of child abuse/neglect reported to the Central Registry.

5. To provide the DPW protective services worker with written information regarding previous incidents of abuse or neglect on any person(s) involved in the current abuse or neglect incident.

6. To be used to update and correct CANRIS information resulting from the on-going investigation of the complaint.

7. To serve as a computerized source of data for tabulation and analysis of abuse or neglect protective services activity, types and volume of abuse and neglect, and basic profile information regarding victims and perpetrators of abuse and neglect for Department policymaking and implementation of preventive programs.

PROCEDURE

1. Description

Form 2202-A, Children's Protective Services Intake and CANRIS Report, is a two page form which is typed or printed legibly. Form 2202-A including Part II, Intake Supplement, is to be completed immediately upon receiving a protective services complaint or report.

Form 2202-A is used to record intake information for and decisions about children's protective services reports received by the Department. If the situation is not appropriate for investigation, Form 2202-A will serve as the only recording of the contact with the complainant and the family. If the situation is investigated, Form 2202-A will serve as documentation of the intake in the case record.

If the complaint appears to involve abuse or neglect, a Child Abuse and Neglect Report and Inquiry System report and a Soundex search are made from the information on Form 2202-A, Part I. Part I is also used to update the Central Registry as the abuse or neglect investigation progresses and to report the findings of the abuse or neglect investigation. **Note:** Cases reported for truancy, runaway behavior, children in need of supervision, unmarried and school-age parents, and court-ordered social studies are **not** reported to CANRIS unless the child's situation appears to involve abuse or neglect.

If the situation is not appropriate for investigation, Form 2202-A, Part I and Part II, is filed in a general clearance file in the local unit. If the situation is investigated, Form 2202-A, Part I and Part II, is placed at the beginning of the dictation concerning the investigation.

2. Initial CANRIS Report

Information collected by the worker at the time of an initial report appearing to involve abuse or neglect and entered on Form 2202-A, Part I, must be reported to the CANRIS Central Registry via the telecommunications center in his area. All incidences must be reported **immediately** upon receipt of the complaint or when at least the last name and sex or ethnic group of one victim or the perpetrator is known. The worker may report the incident by mailing the original copy of the Form 2202-A, Part I, to the telecommunications center **only** when it is not possible to report by telephone.

When making a CANRIS report by telephone, the worker must provide as identification to the terminal operator his budgeted job number, name and office mail code. The information on Part I of Form 2202-A, is to be dictated to the telecommunications operator and then is filed in the case folder. When reporting by telephone, the worker must indicate to the operator persons in the incident on whom a computer search for previous CANRIS information is to be made.

When making a CANRIS report by mail, the worker indicates on Part I of Form 2202-A persons in the incident on whom a computer search for previous CANRIS information is to be made. The origianl copy of Part I of Form 2202-A is to be sent to the telecommunications center and a copy is to be retained in the family's case record. The telecommunications operator should retain the original for future reference.

The minimum data to be entered on Form 2202-A for an initial CANRIS report is as follows:

Section I - Worker ID

Item 1 - Worker Last Name
Item 2 - Worker First Name

Item 3 - Worker Middle Initial, if applicable
Item 5 - Worker Employee Number
Item 6 - Worker BJN
Item 7 - Mail Code
Item 8 - Report

Section II - Incident Report

Item 11 - Date Occurred
Item 12 - Date Reported to DPW
Item 13 - Time Reported to DPW
Item 15 - Reported Incident Type
Item 16 - CANRIS Report Method
Item 17 - Source of Report

Section III - Individual Information
(on at least one person)

Item 20 - Last Name
Item 25 - Sex, or Item 26 - Ethnic Group
Item 29 - Role
Item 31 - City
Item 32 - State
Item 34 - County

3. CANRIS Feedback Report

Whether the CANRIS report is made by mail or telephone, the worker will receive a one-page computer printed Form 2202-B, CANRIS Feedback Report, from State Office. The Feedback Report serves as case record documentation of the CANRIS Report. Upon receipt of the Feedback Report, Form 2202-A, Part I, should be destroyed. The most recent copy of the Feedback Report is retained in the case record with Part II of Form 2202-A.

4. CANRIS Updates, Changes, Corrections, and Deletions

All CANRIS updates, additions, corrections, and deletions are made by completing specific items on a blank Form 2202-A, Part I.

CANRIS update reports **cannot** be made by telephone and cannot be done until receipt of the Form 2202-B, CANRIS Feedback Report. After receipt of the initial Feedback Report, the worker may update the incident as often as necessary.

For all updates, changes or corrections, enter identifying data in Section I plus items to be changed.

To delete an item, enter identifying data in Section I and insert and asterisk "*" in the appropriate box. Only the following items may be deleted, if entered in error:

Item 30 - Street Address
Item 33 - Zip Code
Item 36 - DPW Client Number
Item 37 - Social Security Number
Item 44 - Previous Incident Number
Item 45 - Previous Line Number (Line)
Item 49 - Family Annual Income
Item 50 - Occupation

Section I - Worker Identification

For any update, change, or correction in any section, the following items must be completed in Section I, Worker ID:

Item 1 - Worker Last Name
Item 2 - Worker First Name
Item 3 - Worker Middle Initial, if applicable
Item 4 - CANRIS Incident Number
Item 5 - Employee Number
Item 6 - Budgeted Job Number
Item 7 - Mail Code

Item 9 - Update
Item 10 - Security

Section II - Incident Report

Items in this section can be corrected by entering the information to be changed in the appropriate boxes and completing Section I (Worker Identification). Items cannot be deleted from this section.

Section II - Individual Information

Line numbers (Item 19) are required for all CANRIS updates, changes, and corrections in Section III to identify the individual. The appropriate line number for each individual is obtained from Form 2202-B, CANRIS Feedback Report. Updates, changes, and corrections cannot be made without the appropriate line numbers.

Section IV - Finalizing Information

To update, change, or correct information, enter the corrected information in the appropriate box.

Section V - Last Reporting Worker Identification (Form 2202-B CANRIS Feedback Report Only)

Change or corrections to worker identification information in Section V of CANRIS Feedback Report are made by entering the correct information in Section I, Worker Identification, on a blank Form 2202-A.

Note: For any change or correction, Items 1, 2, 3, 4, 5, 6, 7, 9 and 10 in Section I must be completed.

Submittal

The original of the update Form 2202-A, Part I, is sent to the telecommunications center in ther worker's area for

processing. The worker's copy is retained in the case record until a new Form 2202-B, CANRIS Feedback Report, is received from State Office. The old copy is then destroyed.

5. Finalizing Report

The finalizing report (Section IV of Form 2202-A) must be completed immediately upon determining the disposition of the investigation and within 30 days of the initial complaint. It is expected that within those 30 days the worker will have enough information on the incident to determine its validity. If the family moves before the disposition is determined, the CANRIS report should be finalized immediately. If changes in information on the CANRIS incident occur after the finalizing report is submitted, a new Form 2202-A may be submitted to update items.

CANRIS: To finalize any CANRIS incident, the worker submits Part I of a blank Form 2202-A with the following minimum items completed:

Section I - Worker Identification

Item 1 - Worker Last Name
Item 2 - Worker First Name
Item 3 - Worker Middle Initial, if applicable
Item 4 - CANRIS Incident Number
Item 5 - Employee Number
Item 6 - Budgeted Job Number
Item 7 - Mail Code
Item 9 - Update
Item 10 - Security

Section IV - Finalizing Information

Item 46 - Findings
Item 47 - Disposition

Item 48 - Criminal Action
Item 51 - Date Finalized

Note: Failure to complete any of the above items in the finalizing report will cause the form to be rejected by the computer.

In addition, when the incident is finalized, the following items in Section III must be on file in the CANRIS Central Registry for each person in the incident. These may have been submitted on the initial report or earlier update or else must be a part of the finalizing report.

A. All Individuals

Item 20 - Last Name
Item 24 - Age
Item 25 - Sex
Item 26 - Ethnic Group
Item 27 - Relationship
Item 29 - Role
Item 31 - City
Item 32 - State
Item 34 - County, if in Texas
Item 38 - Living Arrangement

B. All Children

Item 39 - Conservatorship
Item 40 - Court Action

C. All Victims

Item 41 - Abuse Type or
Item 42 - Neglect Type
Item 43 - Fatal

When finalizing the report, the original of Form 2202-A, Part I, is sent to the telecommunications center in the worker's area for processing. The worker's copy is

retained in the case record until a new Form 2202-B, CANRIS Feedback Report, is received from State Offie. The copy is then destroyed.

Non-CANRIS: To finalize the investigation of any non-CANRIS incident)i.e., investigations of reports of truancy, runaway, children in need of supervision, unmarried or school-age parents, and court-ordered social studies), the worker completes the following items in Section IV on Form 2202-A.

Item 51 - Date Finalized
Item 52 - Findings
Item 53 - Disposition

6. SSMS Registration

CANRIS: The CANRIS victim, siblings of the victim, and the parents or stepparents are automatically registered into SSMS when the disposition of the CANRIS incident is reported as **validated, uncertain, or potential.** When a CANRIS incident has a **family moved** disposition, the victim, the victim's siblings, and their parents or stepparents will be automatically registered into SSMS with an Action Code status of OPEN/CLOSED.

Note: Other members of the CANRIS incident may be registered automatically into SSMS if the worker indicates that he wants SSMS registration by completing Item 28, SSMS, on Form 2202-A.

When a CANRIS incident is finalized with a disposition of invalid, automatic SSMS registration will not take place. However, statistics related to those invalidated reports are retained and reported on the SSMS output reports.

Non-CANRIS: Protective services intake situations which are investigated but not reported to CANRIS

must be registered in the Social Services Management System (See instruction for Form 2000, Client Registration.)

7. CANRIS/SSMS Reporting

The CANRIS incident number (Item 4) plus the client line number (Item 19) from Form 2202-B, CANRIS Feedback Report, may be used as a temporary client number to report services delivered to clients on Form 2003, Service Activity, following the initial CANRIS report but prior to SSMS registration. Prior to receipt of the CANRIS Feedback Report, the line number is determined by the sequence in which the individuals are reported into CANRIS.

8. CANRIS Incident and Line Number Assignment

CANRIS incident numbers are assigned to each initial CANRIS report by the computer at the time of data entry by the telecommunications operator. The telecommunications operator informs the reporting worker of the computer assigned CANRIS incident number at the time the telephone report is made. If the initial CANRIS report is made by mail, the incident number will appear on Form 2202-B, CANRIS Feedback Report. The telecommunications operator records the incident number on the initial reporting form at the time of data entry. This document is retained by the telecommunications center for future reference.

The line number is used to identify individuals in the CANRIS incident and is determined by the sequence in which the individuals are reported into CANRIS.

DETAILED INSTRUCTIONS

Part I, Section I—Worker Identification

1. *Worker Last Name* — Enter the last name of the worker completing the form.

2. *First Name* — Enter the first name of the worker completing the form.

3. *Worker Middle Initial (MI)* — Enter the middle initial of the worker completing the form.

4. *CANRIS Incident No. (CANRIS Reports Only)* — This number is assigned by the computer at the time the initial report is entered by the telecommunications operator. This item must be completed by the worker for all updating or finalizing of all CANRIS activity.

Note: The incident number can be obtained from the telecommunications operator, if the initial report is made by telephone, or from Form 2202-B, CANRIS Feedback Report.

5. *Employee Number (EMP. NO.) (CANRIS Reports Only)* — Enter the four-digit DPW employee number of the reporting worker listed in Item 1.

6. *Budgeted Job Number (BJN) (CANRIS Reports Only)* — Enter the eight-digit budgeted job number of the reporting worker listed in item 1.

7. *Mail Code (CANRIS Reports Only)* — Enter the four-digit mail code of the worker listed in Item 2.

8. *Report (RPT) (CANRIS Reports Only)* — For the initial CANRIS report, enter an "X" in this item to show it is the initial report. Leave blank when updating or finalizing a previously reported CANRIS incident.

9. *Update (UD) (CANRIS Report Only)* — For updates, changes, corrections, deletions, or finalizing CANRIS reports, enter an "X" in this item. This item must be completed for all CANRIS updates, corrections, or when finalizing a previously reported incident. Leave blank for an initial CANRIS report.

10. *Security (CANRIS Report Only)* — This item must be completed when updating, correcting, or finalizing a previously reported CANRIS incident. Enter the first three characters of the last name of the first individual listed in Section III of the CANRIS Feedback Report. Leave blank for an initial CANRIS report. This code is used to ensure that updates are made to the right report.

Section II — Incident Report

11. *Date Occurred to Child* — Enter the numerical date on which the abuse, neglect, truancy, runaway, etc. occurred. This item should contain the exact date, if known, or approximate date. (For example, September 3, 1976, is entered 09/03/76.) In on-going neglect situations, enter the date the situation first became known to the complainant.

12. *Date Reported to DPW* — Enter the numerical date on which the complainant contacted DPW to report the alleged protective services incident.

13. *Time Reported to DPW* — Enter the numerical time when the report was received by DPW. (Example: 08:25) Indicate a.m. or p.m. by entering an "X" in the appropriate box.

14. Reserved for future use. Do not complete.

15. *Reported Incident Type (CANRIS Reports Only)* — Indicate the type of incident the complainant alleges has occurred by placing an "X" in the appropriate box. Use

the "A" box for abuse, the "N" box for neglect, and the "B" box for both abuse and neglect.

16. *Report Method (CANRIS Reports Only)* — For the initial CANRIS report, enter an "X" in the appropriate box to indicate whether the worker phoned or mailed the CANRIS report to the telecommunications center. Leave blank for update CANRIS reports.

17. *Source of Report (CANRIS Reports Only)* — Enter the appropriate category of source of report from the list below.

EPSDT	Any person reporting as a result of EPSDT medical screening or other EPSDT health services. If this applies, use this source of report rather than doctor, clinc, etc.
Doctor	Any member of the medical profession, including surgeons, radiologists, dentists, chiropractors, etc.
Hospital	Any personnel working within a public or private hospital setting.
Clinic	Personnel in any clinic setting, including private clinics, public health clinics, visiting nurse associations, etc.
Law	Any personnel whose function is law enforcement, including judges, county, or district attorneys, police, sheriffs, etc.
Public SA	Personnel connected with any public social agency other than DPW.
DPW	Any person employed in any capacity by DPW
Private SA	Personnel connected with any private social agency, church, religious group, etc.

School	Personnel connected with any public or private school, such as principal, counselor, teacher, etc.
Child Care	Any personnel connected with a child care facility, including day care facilities, self-facility, including day care facilities, institutions, etc.
Parent	Either parent or parent substitute, including a self-referral.
Victim	Child who has been abused or neglected.
Relative	Any relatie, including siblings, except parent or parent substitute.
Neighbor	Any person living at a residence near or next to that of the parent(s), parent substitute(s), or child(ren), excluding the above categories.
Friend	Any person who was acquainted with the family prior to the incident, excluding the above categories.
Anonymous	Complainant will not identify self.
Other	Limited **only** to individuals who do not conceivably fit into any of the above categories. It should **seldom** be necessary to use this category.

18. This item is reserved for future use. Do not complete.

Section III — Individual Information

19. *Line Number (LN. NO.) (CANRIS Reports Only)* — The line number indicates the sequence in which individual names are entered on the Central Registry.

The worker must enter the number for each individual listed in the space provided.

The line number will appear on the CANRIS Feedback Report and must be used when submitting all additions, deletions, corrections, and finalizations of a CANRIS report to identify the individual being reported.

If the number of individuals to be reported exceeds five, the worker continues the numbering sequence on a second Form 2202-A.

20. *Last Name* — Enter the last name of each individual in the incident. Individuals to be reported include the children allegedly in need of protection, all other siblings in the home. parent(s) or parent substitute(s) who are responsible for the health and welfare of the children, and the perpetrator (if not the parent or parent substitute). Known aliases of any of the above should be listed as a separate individual.

Note: The mother's or mother substitute's maiden name is reported in the same way as an alias. Do not include as aliases nicknames which are derivatives of the person's legal name.

This item is limited to 15 letters. If the last name contains more tha 15 letters, the printout will show only the first 15 letters of the name.

21. *First Name* — Enter the first name of each individual in the incident. If the first name contains more than 10 letters, the printout will show only the **first** 10 letters of the name. Do not use nicknames as aliases if they are derivatives of the person's given name.

22. *Middle Initial (MI)* — Enter the individual's middle initial, if known.

23. *Birth Date* — Enter each individual's birth date by month/day/year. If the birth date is unknown, leave blank. On the computer printout, this date may appear as year only if the age only was given at the time of initial report (for example, 00/00/71).

24. *Age* — Enter the age, if known, or approximate age using two-digit whole numbers only. The age of infants under one year is coded as 00. For example, the age of a six-month old infant is entered as 00; age of an 18-month old child is entered as 01.

Note: It is important that this item be completed to aid in individual identification. This item must be completed for every individual on the finalizing report.

25. *Sex* — Enter the appropriate code to indicate the sex of each individual.
M — Male
F — Female

26. *Ethnic Group (ETH)* —Enter the two-character letter code from the following which most closely identifies the ethnic group.

Ethnic Group	Code	Definition
Anglo	AN	Refers to Caucasian or white ethnic group
Black	BK	Refers to Negro or Black ethnic group
Mexican-American	MX	Refers to Mexican-American, Spanish-American, Chicano or Mexican ethnic group
American Indian	AI	Refers to American Indian ethnic group

Oriental	OR	Refers to Oriental ethnic group
Other	OT	Refers to a person having a mixture of ethnic origins, none of which is predominant

27. *Relationship (REL'SHIP)* — for the oldest child allegedly in need of protection, enter the two or three-letter code for the oldest victim. For all other persons listed, select the appropriate two or three-letter code which describes this relationship to the oldest victim.

If the name listed is an alias, select the appropriate relationship code and add the code letter "A." This item is always a three-letter code when it refers to an alias. Example: An alias used by the natural father is coded as "FAA."

Relationship	Code	Alias
Oldest Victim	OV	OVA
Father	FA	FAA
Mother	MO	MOA
Stepfather	SF	SFA
Stepmother	SM	SMA
Preconsummation Adoptive Father	AF	AFA
Preconsummation Adoptive Mother	AM	AMA
Foster Father	FF	FFA
Foster Mother	FM	FMA
Grandfather	GF	GFA
Grandmother	GM	GMA
Brother	BR	BRA
Sister	SI	SIA
Stepbrother	SB	SBA
Stepsister	SS	SSA
Aunt	AU	AUA
Uncle	UC	UCA

Other Relative	OT	OTA
School Personnel	SC	SCA
Day Care Personnel	DC	DCA
Institutional Personnel	IN	INA
None of the above	NO	NOA
Unknown	UN	UNA

Note: The legal but non-natural parent is the same as the natural parent.

28. *Social Services Management System (SSMS) (CANRIS Reports Only)* — Enter an "X" in this item if you want the individual reported to CANRIS to be registered into the Social Services Management System. Use this item only for persons not automatically registered into SSMS at finalization of the report. Refer above to Item 6 under procedure for information on persons automatically registered into SSMS.

29. *Role (CANRIS Reports Only)* — This item identifies the victim(s) and the perpetrator(s) of the abuse or neglect incident. Select the appropriate two-letter code from the following list.

Role	Code	Definition
Victim	VC	Used to identify the abused or neglected child(ren)
Perpetrator	PR	Used to identify the person(s) who is allegedly abusing or neglecting the child(ren)
Unknown	UK	Used if the person's role is not known
Uncertain	UC	Used if there is evidence to indicate the person's alleged role but enough doubt remains to require further investigation
Not Involved	NO	Used if the person is definitely not the victim or the perpetrator

Note: If the name item contains an alias, the role item is to contain the line number of the person to whom the alias applies, **not** a role code. For example, if line number 4 contains the alias of name line 2, the role space of line 4 should contain the number 2.

30. *Street Address* — Enter the correct house number and street name. If there is no house number or street name, enter the route number and box number. If this item is the same as for the individual on the line immediately above, ditto marks may be entered. If more than one page is used, this item must be completed on the first line of each page.

31. *City* — Enter the name of the city. If this item is the same as for the individual on the line immediately above, ditto marks may be entered. If more than one page is used, this item must be completed on the first line of each page.

32. *State (ST)* — Enter the two-letter code to indicate the state. If the state is not shown below, enter the United States Postal Service two-letter code for that state. If this item is the same as for the individual on the line immediately above, ditto marks may be entered. If more than one page is used, this item must be completed on the first line of each page.

State	Code
Arkansas	AR
Louisiana	LA
New Mexico	NM
Oklahoma	OK
Texas	TX

33. *Zip Code* — Enter the five-digit zip code for the individual's address. If this item is the same as for the individual on the line immediately above, ditto marks

may be entered. If more than one page is used, this item must be completed on the first line of each page.

34. *County No. (CNTY)* — Enter the appropriate three-digit Texas county number of the individual's residence. If the county is not in Texas, enter "999" in this space. If this item is the same as for the individual on the line immediately above, ditto marks may be entered. If more than one page is used, this item must be completed on the first line of each page.

35. *Soundex Request (SNDX REQ) (CANRIS Reports Only)* — For each individual in the CANRIS incident for whom the reporting worker requests a Soundex search by mail, the worker must enter his initials in the Soundex request item for that individual. When this item is initialed, a computer search of the CANRIS files will be made to determine if there are previous incidents involving this individual. A hard copy of any possible name matches will be sent to the reporting worker. Leave blank if no Soundex search is requested for the individual.

36. *DPW Client No.* — Enter the nine-digit DPW social services client number for each individual as reported to the Social Services Management System. Leave blank if the client is not registered into SSMS.

37. *Social Security No.* — Enter the social security account number, if known, for each individual in the incident. Leave blank if unknown.

38. *Living Arrangement (LA)* — Enter one of the following two-digit codes to indicate each individual's rent living arrangement. If the living arrangement has changed at the time of the finalizing report, this item must be updated. If the individual dies, enter the living arrangement at the time of death.

01 — Own Home —

(1) An adult in his personal residence; rented, supplied at no cost, buying, or owned; living alone, with a spouse, and/or children. Other related or unrelated individuals might be living in this home;

(2) A child that is living with his parents, siblings, or guardian in their personal residence; rented, supplied at no cost, buying, or owned.

02 — Relative's Home — An individual living with a relative other than his parents, siblings, or guardian.

03 — Independent Living Arrangement — A child living apart from his family, relatives, or guardian in a situation in which he has generally placed himself.

04 — Adoptive Home — A home with individuals who are expecting to adopt a child, but the adoption has not been consummated.

05 — DPW Foster Family Home — A facility certified by DPW providing 24-hour care for six or fewer children.

06 — Other Foster Family Home — A commercial or non-DPW agency boarding home providing 24-hour care for six or fewer children.

07 — DPW Foster Group Home — A child care facility certified by DPW which provides care for 7 to 12 children for 24-hours a day.

08 — Other Foster Group Home — A commercial or non-DPW facility which provides 24-hour care for 7 to 12 children.

09 — Emergency Shelter Foster Home — A facility licensed or certified as a boarding home which cares for six or fewer children for emergency short-term care only.

10 — Emergency Shelter Foster Group Home — A facility licensed or certified as a foster group home which care for 7 to 12 children for emergency short-term care only.

11 — Emergency Shelter Institution — A child-caring institution licensed or certified as an emergency shelter which cares for 13 or more children.

12 — Public Child-Caring Institution — A facility operated by the State or its political subdivision which provides basic child care for 13 or more children for 24 hours a day.

13 — Private Child-Caring Institution — A private facility which provides basic child care for 13 or more children for 24 hours a day.

14 — Public Institution for the Mentally Retarded — An institution administered by a governmental agency to provide care to 13 or more mentally retarded individuals on a 24-hour a day basis.

15 — Private Institution for the Mentally Retarded — A profit or nonprofit institution licensed by the Department of Public Welfare or other governmental agency to provide care to 13 or more mentally retarded individuals on a 24-hour a day basis.

16 — Public Institution for the Emotionally Disturbed or Mentally Ill — An institution administered by a governmental agency to provide care

to 13 or more emotionally disturbed or mentally ill individuals on a 24-hour a day basis (includes residential treatment center).

17. — Private Institution for the Emotionally Disturbed or Mentally Ill — A profit or nonprofit institution licensed by the Department of Public Welfare or other governmental agency to provide care to 13 or more emotionally disturbed or mentally ill individuals on a 24-hour a day basis (includes residential treatment center).

18 — Public or Private Institution for the Physically Handicapped — A profit or nonprofit institution licensed by the Department of Public Welfare or other governmental agency to provide care to 13 or more physically handicapped individuals on a 24-hour a day basis.

19 — Public or Private Institution for the Blind or Deaf — A profit or nonprofit institution licensed by the Department of Public Welfare or other governmental agency to provide care to 13 or more blind or deaf individuals on a 24-hour a day basis.

20 — Detention or Correctional Facility — A facility under the jurisdiction of the Department of Corrections or the Texas Youth Council or other city or county government for the retention of individuals for whom a judicial decision has been made to remand them to said institution.

21 — Maternity Home — A temporary residence for prenatal or postpartum care.

22 — Halfway House — A transitional residence for emotionally or behaviorally disturbed, alcoholic or drug addicted people who, while not in need of confinement in an institution, are unable to cope with the usual family or community life.

23 — State TB Hospital — A facility administered by the State for the treatment of tuberculosis.

24 — Other Hospital — A facility licensed by the Texas Department of Health Resources as a hospital.

25 — Nursing Home — A facility certified by the Department of Public Welfare and licensed by the Texas Department of Health Resources to give medical or social care as listed in the Texas Directory of Nursing Homes.

33 — Other — A child or adult in a living arrangement other than above.

34 — Unknown — A child or adult whose living arrangement is not known.

39. *Conservatorship (CONS) (CANRIS Reports Only)* — Enter the appropriate two-character code for **each child** in the report at the time of the finalizing CANRIS report. Leave blank for all adults.

Conservatorship of Child

Conservatorship	**Code**
Not changed	NC
Placed with DPW	DW
Changed, not placed with DPW	ND

40. *Court Action (CA) (CANRIS Reports Only)* — For **each child** in the report, enter the appropriate two-letter code for the court action at the time of the finalizing report.

Court Action

Action	Code
No petition filed	NO
Request to file refused	RR
Petition filed	PF
Petition withdrawn	PW
Conservator appointed	CA
Conservator not appointed	CN

41. *Abuse Type (CANRIS Reports Only)* — When the CANRIS report is finalized, for each victim in the CANRIS incident, enter the four-letter code for the appropriate type of alleged abuse. If more than one type of abuse is identified, the workers enters the **one** type he considers to be the primary abuse. If no abuse is identified, enter "NONE."

Type of Abuse or Injury	Code	Definition
Bone Fracture	BONE	Medical diagnosis
Brain Damage	BRAI	Medical or Psychiatric diagnosis
Bruises	BRUI	Observable injuries
Burns	BURN	Observed injuries inflicted by any hot object
Concussion	CONC	Medical diagnosis
Confinement	CONF	Tied up, locked up, kept in isolation in attic, closet or any other small restricted area
Dislocation	DISL	Bone structure — medical diagnosis
Dismemberment	DISM	Loss of bodily limb(s)
Emotional Abuse	EMOT	May be manifested in a variety of ways such as extremes of scapegoating, name calling, derisive or belittling comments, constant expectations far above the child's capabilities, constant rejection, etc., resulting in the child feeling worthless or bad. May be determined through psychological or psychiatric evaluation.
Exploitation	EXPL	Child forced to perform activities for the benefit of an adult, such as beg steal, prostitute, work long hours, etc.
Exposure	EXPO	Child forced to remain outside in extremely cold weather (result-frost bite or freezing) or extremely hot weather (result-severe sunburn or heat prostration)
Hematoma, Subdural	HEMA	Medical diagnosis
Hemorrhage, Subdural	HEMR	Medical diagnosis
Internal Injuries	INTL	Medical diagnosis
Malnutrition	MALN	Deliberate withholding of food
Poisoning	POIS	Includes drugs - deliberate act inflicted on child
Scalding	SCAL	Deliberate act inflicted on child using any hot liquid as differentiated from "burns"

Sexual Abuse	SEXL	Any sex act perpetrated on a child
Skull Fracture	SKUL	Medical diagnosis
Sprains	SPRA	Medical diagnosis
Suffocation	SUFF	Child deprived of oxygen (includes strangling, asphyxiation or drowning)
Welts	WELT	Observable injuries
Wounds	WOUN	Observable injuries - includes abrasions, lacerations, cuts, or punctures
None	NONE	Use this code when no abuse exists

42. *Neglect Type (CANRIS Reports Only)* — When the CANRIS incident is finalized, enter the four-letter code for the appropriate type of alleged neglect for each victim in the CANRIS incident. If more than one type of neglect is identified or suspected, the worker should enter the **one** type he considers to be the primary neglect. If no neglect is identified, enter "NONE."

Neglect Type	Code	Definition
Abandonment	ABAN	Parent(s) or parent substitute(s) leaves child with no intention to return
Educational	EDUC	Child kept out of school continuously or for long periods of time
Medical	MEDI	Failure to provide needed medical attention (see Section 7211 of Social Services Handbook for limitations)

Physical	PHYS	Child always in dirty, ragged clothes, home filthy, vermin infested, garbage and litter strewn around; child fed erratically or not at all, or fed spoiled, unsanitary, contaminated food
Lack of Supervision	SUPE	Child left without adult supervision for long period of time - depends upon duration, extent and age of child
None	NONE	Use this code when no neglect exists

43. *Fatal (FTL) (CANRIS Reports Only)* — For each victim enter "Y" for Yes or "N" for No to indicate whether the abuse or neglect was fatal.

44. *Previous Incident Number (PREV INC NO) (CANRIS Reports Only)* — Enter the previous CANRIS incident number if the individual was previously reported to CANRIS. This number can be obtained from DPW records or through a Soundex search of CANRIS files. If more than one previous CANRIS incident has been reported, enter the number of the **latest** incident only. Leave blank if there is no previous CANRIS incident number.

Note: Before entering a previous incident number, the worker should be certain that the individual reported is the same as the individual in the previous incident.

45. *Line (CANRIS Reports Only)* — Enter the CANRIS line number that identifies the individual in the last previous CANRIS incident reported in Item 44.

Section IV — Finalizing Information

This section is to be completed by the worker who finalizes the investigation.

46. *Findings (CANRIS Reports Only)* — Enter one of the following one-character codes to indicate the type of case found as a result of the investigation.

A—Abuse
N—Neglect
B—Both Abuse and Neglect
C—Neither Abuse nor Neglect (use only for invalid dispositions and when family has moved)

47. *Disposition (DISP)(CANRIS Reports Only)* — Enter the appropriate three-letter code in the space provided to show the outcome of the abuse or neglect investigation.

Disposition	**Code**	**Definition**
Validated	VAL	Abuse or neglect has been substantiated
Invalidated	INV	Abuse or neglect has been **clearly** ruled out
Uncertain	UNC	Actual abuse or neglect cannot be substantiated or completely ruled out, but there is enough evidence from the investigation to establish a reasonable doubt that there may be abuse or neglect
Potential Identified	POT	Actual abuse or neglect cannot be substantiated but there is sufficient evidence to identify that abuse or neglect is **likely** to occur as a result of existing conditions in the home which seriously threaten the child's physical or emotional well being. In these instances, continuing social services are indicated to prevent the actual occurrence of abuse or neglect
Family Moved	MOV	Family moved before any of above dispositions were made

Note: When disposition item is entered in CANRIS reports, Item 29 "Role" should be updated as follows:

(1) If the report is validated, there must be either a victim or a perpetrator, and there should be both.

(2) If the report is invalidated, there is no victim or perpetrator and the role of all individuals in the incident become "NO" (not involved).

(3) If the results of the investigation are uncertain or the family moved, the roles become "UC" (uncertain), "UK" (unknown), or "NO" (not involved), depending on the worker's evaluation of the situation. All roles cannot be "NO" (not involved).

(4) If the investigation identifies potential abuse or neglect, a potential victim or perpetrator must be identified.

48. *Criminal Action (CRIM ACT) (CANRIS Reports Only)* — Enter the appropriate two-letter code to indicate status of criminal action for the current incident.

Criminal Action

Action	Code
No charge filed	NC
Charges filed	CF
Charged dropped	CD
Hearing set	HS
Hearing postponed	HP
Hearing in process	IP
Perpetrator convicted	PC
Perpetrator acquitted	PA

49. *Annual Income (ANN'L INC) (CANRIS Reports Only)* — Enter the approximate **yearly** income of the victim's family. Round the amount to the nearest dollar. For example, $10,061.38 should be entered as $10,061.

50. *Primary Provider Occupation (OCC) (CANRIS Reports Only)* — Enter one of the following three-letter codes to indicate the occupation of the main provider in the victim's family unit.

Occupation	Code	Definition
Not in Labor Force	NLF	All persons not currently in the labor force: student, housewife, etc.
Unemployed	UNE	Persons unable or unwilling to find suitable employment
Unskilled Labor	USK	Those jobs requiring little or no formal training or acquisition of specific skills: janitor, waitress, day laborer, etc.
Skilled Labor	SKL	Requiring some degree of formal training or apprenticeship, trade school: plumber, mechanic, beautician, etc.
Bussiness/ Professional	BUS	High level of skills in dealing with people: legal, medical, education, administration, etc.
Agriculture	AGR	Persons directly involved in production of agricultural products: farmer, rancher, forester, farm laborer, etc.
Technical	TEC	High level of skills in dealing with industrial application: draftsman, electronic technician, etc.
Other	OTH	Persons who cannot be related to above occupations
Unknown	UNK	Occupation of primary provider is unknown

51. *Date Finalized* — Enter the month, day, and year on which the worker completes the finalizing information.

52. *Findings (Non-CANRIS Cases Only)* — Enter one of the following two-character codes to indicate the primary type of case found as a result of the non-CANRIS investigation:

TR	—	Truancy
RU	—	Runaway
CH	—	Child in Need of Supervision
UN	—	Unmarried or School-Age Parent

CO	—	Court Ordered Social Study
OT	—	Other Type of Protective Service Needed
NO	—	No Need for Protective Services Found (Use only for invalid dispositions)

53. *Disposition (DISP) (Non-CANRIS Cases Only)* — Enter the appropriate three-letter code in the space provided to show the outcome of the non-CANRIS investigation:

Disposition	Code	Definition
Validated	VAL	Need for protective services has been substantiated
Invalidated	INV	Need for any type of protective services has been clearly ruled out
Uncertain	UNC	Actual need for protective services cannot be substantiated or completely ruled out, but there is sufficient evidence from the investigation to establish a reasonable doubt about the need for protective services
Potential	POT	Actual need for protective services cannot be substantiated, but there is enough evidence to identify that the need for protective services is likely to occur as a result of existing conditions in the home which seriously threaten the child's physical or emotional well-being

Family Moved	MOV	Family moved before any of the above dispositions were made

54. Reserved for future use. Do not complete.

55. Reserved for future use. Do not complete.

Section V — Last Reporting Worker Identification

Items 56 through 62 appear only on Form 2202-B, CANRIS Feedback Report. These items are completed by the computer and will identify the last reporting worker. Corrections and updates of this information must be made in Section I of a blank Form 2202-A.

56. *Worker Last Name* — This item contains the last name of the last reporting worker.

57. *First Name* — This item contains the first name of the last reporting worker.

58. *Middle Initial (MI)* — This item contains the middle initial of the last reporting worker.

59. *Employee Number (EMP NO)* — This item contains the four-digit employee number of the last reporting worker.

60. *Budgeted Job Number (BJN)* — This item contains the eight-digit budgeted job number of the last reporting worker.

61. *Mail Code* — This item contains the office mail code of the last reporting worker.

62. Reserved for future use. Do not complete.

63. *Page of Pages* — Use this item to indicate number of pages of Part I when the number of reported individuals in the incident requires two or more pages of

Part I. For example, if two pages are needed, enter **1** of **2** on the first page and **2** of **2** on the second page. When more than one page is needed, complete Items, 1, 2, 3, 4 (for updates), 5, 6, 7, either 8 or 9, 10, 12, and 13 on the additional pages. Staple together all pages of a single report.

64. *Worker Signature* — The reporting worker must sign the form.

Part II — Intake Supplement

Presenting Problems — Briefly describe the presenting problems of the alleged abuse, neglect, truancy, runaway, children in need of supervision, unmarried or school-age parent, court-ordered social study, OTI, etc.

Is the Child in Immediate Danger — Check "Yes," "No," or "Possibly" to indicate whether the child is in immediate danger of being permanently harmed or losing his life.

Has a Doctor Seen the Child — Check "Yes" or "No" to indicate whether the child has been seen by a physician. If the child has been seen by a physician, enter the name of the doctor, date seen, and treatment given.

Is Immediate Removal/Placement Needed — Check "Yes," "No," or "Possibly" to indicate whether immediate removal of the child from his current situation is needed. If immediate removal is needed, state the reason.

Complainant — When possible, enter identifying information on the person who made the complaint, including name, phone number, address, and relationship to child.

Present/Previous Case: Local Records/CANRIS Soundex Information — Enter notes on location,

disposition of, or other pertinent information on any current or previous case(s) involving this client.

Action Taken

Worker Recommendation — The worker enters his recommendation for whether continued protective services are needed. The worker enters the reasons and the date of his recommendation.

Supervisor Decision — The supervisor notes whether the case is assigned for continued protective services. If yes, enter the name of the worker assigned. If no, enter the reason for not continuing protective services. Enter the date of the decision and supervisor's signature.

FORM 2202-B
Instructions

CANRIS FEEDBACK REPORT

PURPOSE

Form 2202-B, CANRIS Feeback Report, is printed by the computer from information supplied to the telecommunications terminal. Form 2202-B is mailed to the worker for confirmation of data on file. Form 2202-A, Children's Protective Services Intake and CANRIS Report, Part I, is used to update information on file.

CANRIS CODE CARD

SOURCE OF REPORT

EPSDT
Doctor
Hospital
Clinic
Law
Public SA
DPW
Private SA
School
Child Care
Parent
Victim
Relative
Neighbor
Friend
Anonymous
Other

SEX

M Male
F Female

ETHNIC GROUP

AN Anglo
BK Black
MX Mexican-American, Mexican, Chicano, Spanish-American
AI American Indian
OR Oriental
OT Other

RELATIONSHIP

Code	Alias Code	
OV	OVA	Oldest Victim
FA	FAA	Natural Father
MO	MOA	Natural Mother
SF	SFA	Stepfather
SM	SMA	Stepmother
AF	AFA	Preconsummation Adoptive Father
AM	AMA	Preconsummation Adoptive Mother
FF	FFA	Foster Father
FM	FMA	Foster Mother
GF	GFA	Grandfather
GM	GMA	Grandmother
BR	BRA	Brother
SI	SIA	Sister
SB	SBA	Stepbrother
SS	SSA	Stepsister
AU	AUA	Aunt
UC	UCA	Uncle
OT	OTA	Other Relative
SC	SCA	School Personnel
DC	DCA	Day Care Personnel
IN	INA	Institutional Personnel
NO	NOA	None of the above
UN	UNA	Unknown

ROLE IN INCIDENT

VC Victim
PR Perpetrator
UK Unknown
UC Uncertain
NO Not Involved

STATE

AR Arkansas
LA Louisiana
NM New Mexico
OK Oklahoma
TX Texas
Any other state, use 2-letter code of U.S. Postal Service.

LIVING ARRANGEMENT

01 Own Home
02 Relative's Home
03 Independent Living Arrangement
04 Adoptive Home
05 DPW Foster Family Home
06 Other Foster Family Home
07 DPW Foster Group Home
08 Other Foster Group Home
09 Emergency Shelter Foster Home
10 Emergency Shelter Foster Group Home
11 Emergency Shelter Institution
12 Public Child-Caring Institution
13 Private Child-Caring Institution
14 Public Institution for Mentally Retarded
15 Private Institution for Mentally Retarded
16 Public Institution for the Emotionally Disturbed
17 Private Institution for the Emotionally Disturbed
18 Public or Private Institution for Physically Handicapped
19 Public or Private Institution for the Blind or Deaf
20 Detention or Correctional Facility
21 Maternity Home
22 Halfway House
23 State TB Hospital
24 Other Hospital
25 Nursing Home
33 Other
34 Unknown

CONSERVATORSHIP OF CHILD

NC Not changed
DW Placed with DPW
ND Changed, not placed with DPW

COURT ACTION

NO No petition filed
RR Request to file refused
PF Petition filed
PW Petition withdrawn
CA Conservator appointed
CN Conservator not appointed

ABUSE TYPE

BONE Bone Fracture
BRAI Brain Damage
BRUI Bruises
BURN Burns
CONC Concussion
CONF Confinement
DISL Dislocation
DISM Dismemberment
EMOT Emotional Abuse
EXPL Exploitation
EXPO Exposure
HEMA Hematoma, Subdural
HEMR Hemorrhage, Subdural
INTL Internal Injuries
MALN Malnutrition
POIS Poisoning
SCAL Scalding
SEXL Sexual Abuse
SKUL Skull Fracture
SPRA Sprains
SUFF Suffocation
WELT Welts

WOUN Wounds
NONE None

NEGLECT TYPE

ABAN Abandonment
EDUC Educational
MEDI Medical
PHYS Physical
SUPE Lack of Supervision
NONE None

FINDINGS (CANRIS Reports Only)

A Abuse
N Neglect
B Both Abuse and Neglect
C Neither Abuse nor Neglect

FINDINGS (Non-CANRIS Reports Only)

TR Truancy
RU Runaway
CH Child in Need of Supervision
UN Unmarried or School-age Parent
CO Court-Ordered Social Study
OT Other Type of Protective Services Needed
NO No Need for Protective Services

DISPOSITION

VAL Validated
INV Invalidated
UNC Uncertain
POT Potential Identified
MOV Family Moved

CRIMINAL ACTION

NC No charge filed
CF Charges filed
CD Charges dropped
HS Hearing set
HP Hearing postponed
IP Hearing in process
PC Perpetrator convicted
PA Perpetrator acquitted

OCCUPATION

NLF Not in Labor Force
UNE Unemployed
USK Unskilled
SKL Skilled
BUS Business/Professional
AGR Agriculture
TEC Technical
OTH Other
UNK Unknown

State Department of Public Welfare
General Information
326.01

Temporary Adoptions
Social Services Handbook
326.01.01.040

The Department of Public Welfare proposes to amend its rule adopting by reference the Social Services Handbook narrative section. The amendment reflects an addition to Section 7222. Proposed to be added are these statements about the Department's Child Abuse and Neglect Report and Inquiry System (CANRIS):

Names reported into CANRIS will be automatically removed from the files after a period of six months when the report of abuse and/or neglect has been invalidated.

CANRIS reports that have been determined to be validated, uncertain, potential, or moved will remain on the files until the youngest victim reported in the case reaches the age of eighteen.

Also included are definitions of invalidated, validated, uncertain, potential, and moved as they relate to investigations of reported child abuse and neglect.

CANRIS is an automated system designed to facilitate reporting of child abuse and neglect and to collect and store confidential information in a central registry. Reporting to and inquiring of the CANRIS system are functions limited to authorized Departmental protective services staff.

Written comments are invited and may be sent to Susan Johnson, Systems and Procedures Bureau—216, Department of Public Welfare, John H. Reagan Building, Austin, Texas, 78701, within 30 days of the publication of this *Register*.

A public hearing to consider this proposed amendment has been scheduled for 9:00 a.m., Wednesday, May 5, 1976, in Room 411, John H. Reagan Building, Austin, Texas. Those wishing to make oral or public comment may do so at that time.

This amendment is proposed under the authority of Article 695c, Texas Civil Statutes.

.040. Social Services Handbook. The Department of Public Welfare adopts by reference the rules contained

in the policy and procedure, narrative, sections of the Social Services Handbook AS AMENDED IN MAY, 1976.

Issued in Austin, Texas on _____.

Raymond W. Vowell
Commissioner
State Department of Public Welfare

STATE DEPARTMENT OF PUBLIC WELFARE

OFFICE MEMORANDUM
April, 1976

TO: All Holders of Social Services Handbook

FROM: Jerome Chapman
Deputy
Commissioner
State Office

Social Services
Handbook Revision
No. ____

SUBJECT: Removal of Names Reported into CANRIS

Make the following changes in your Social Services Handbook:

Substitute

Page 7222*-7223

Names reported into CANRIS will be automatically removed from the files after a period of six months when the report of abuse and/or neglect has been invalidated. Reports that have been determined to be Validated, Uncertain, Potential or Moved remain on the files until

the youngest victim reported in the case reaches the age of 18 years.

Jerome Chapman

JC:fh

Attachment

All reports of abuse and neglect must be reported to CANRIS. Even though the case may be active at the time the report is received, the new report should be entered into the CANRIS system. An inquiry about previous incidents is to be made on all reports of abuse and neglect, unless the case is currently active and the information has already been received. When a report of child abuse or neglect is received, the worker immediately make a report and inquiry through CANRIS by calling a telecommunications operator. CANRIS telecommunications centers are located throughout the State. Form 2202-B, CANRIS Feedback Report, will be printed by the computer from information supplied via the telecommunications terminal. The CANRIS Feedback Report will be mailed to the worker for confirmation of data, updating, correcting, or filing. Updating must be completed as follows:

1. During investigation to enter information which necessitated another inquiry.

2. Within 30 days after the receipt of the report to indicate a determination of the validity or invalidity of the occurrance of abuse or neglect.

3. As soon as a family moves, if they do so prior to the determination concerning validity.

4. As soon as court action regarding the child or family is finalized, if still pending beyond 30 days of the date of receipt of the report.

Names reported into CANRIS will be automatically removed from the files after a period of six months when the report of abuse and/or neglect has been invalidated.

Invalidated is defined as a case in which the investigating worker has proven that neither abuse nor neglect exists.

CANRIS reports that have been determined to be Validated, Uncertain, Potential or Moved will remain on the files until the youngest victim reported in the case reaches the age of eighteen.

Validated is defined as a case in which the investigating worker has proven that neglect or abuse exists.

Uncertain is defined as a case in which actual abuse or neglect cannot be substantiated or completely ruled out, but there is enough evidence from the investigation to establish a reasonable doubt that there may be abuse or neglect.

Potential is defined as those cases where actual abuse or neglect cannot be substantiated but there is sufficient evidence to identify that abuse or neglect is likely to occur as a result of existing conditions in the home which threaten the child's physical or emotional well-being.

Moved is defined as a case where the reported individuals have moved from the reported location and the investigating worker is unable to establish their whereabouts.

If licensing or social services staff suspect during the course of a home or licensing study that the family or

individual may have been involved in an abuse or neglect situation in the past, the worker may request a CANRIS inquiry on the family or individual. The inquiry is requested by submitting a memo to the Chief Administrator, Social Services Branch State Office. The request must include specific reasons for the request, the family member's or individual's full name, birth date, sex, ethnic group and social security number.

The decision regarding intervention by the Department may be shared with an agency or professional person making the report. Protective services staff should make themselves available to physicians or professional persons in hospitals, clinics, or schools requesting to have inquiry information without making a report. The requirement to enter a report of abuse or neglect before inquiry information can be obtained should be explained to the professional person. The worker may discuss with the professional person whether the inquiry without a report would place the professional person in violation of the mandatory reporting law (see Item 7111, Child Abuse or Neglect Reporting Law). Validity of the identity of the professional person must be obtained before confidential information is released. The professional person will be helped to understand the confidential nature of the inquiry information and how it should be used in acting on the reported abuse or neglect. If the professional person declines making a report, the worker and supervisor must evaluate the possibility of abuse or neglect in the case, based on the information gained from the professional person at the time of the request for a CANRIS inquiry. If it is felt that potential danger to the child exists, a CANRIS report and further inquiry into the situation should be made by the worker.

Cases reported for truancy, runaway behavior, juveniles in need of supervision, unmarried and school-age parents are not reported into the CANRIS system unless the child's situation appears to involve abuse or neglect. If abuse or neglect is suspected to be a problem in the youth's situation, a report into CANRIS is made.

A CANRIS report will be made of a complaint or report stating that the death of a child was attributed to abuse or neglect, even if no other children remain in the home.

CANRIS information must be kept up-to-date regarding the findings of all reports made to the Department of abuse and neglect and the disposition of each case.

7223 Investigation of Complaint or Report

If the complaint does not obviously fall outside the Department's responsibility to see to the protection of children, an investigation is made into the child's situation to determine whether the child is in need of protective services. The primary purpose of the investigation shall be the protection of the child. TEX. FAM. CODE §34.05(a). The investigation will be mde in a non-accusatory and non-punitive manner conducive to maintaining the parent-child relationship and strengthening the family, if possible. Protection will be provided for the child when needed. The investigation is to be completed within 30 days if possible.

Priorities or continuing the investigation are centered around the seriousness of the child's situation. If the complaint indicates that the child's life or safety is in danger, or that he may be injured, an investigation is to be made immediately to determine the nature and extent of harm to the child and the steps which must be taken to protect him.

June 18, 1976

MEMORANDUM

TO: Chairman and Members
State Board of Public Welfare

FROM: Raymond W. Vowell
Commissioner

SUBJECT: AGENDA ITEM NO. 8a - Approval of Policies Previously Published in *The Texas Register:* Removal of Names from Child Abuse and Neglect Report and Inquiry System

Proposed policy and procedural changes to the Social Services Handbook and the Child Abuse and Neglect Report and Inquiry System (CANRIS) were published in *The Texas Register* on April 20, 1976, for a thirty (30) day public review and comment period. These changes deal with the removal of names and identifying information from the central computer file after a six month period when the report of abuse or neglect has been invalidated. CANRIS reports that have been determined to be validated, uncertain, potential, or moved would remain on file until the youngest victim reaches the age of 18. Also included were definitions of the terms invalidated, validated, uncertain, potential and moved.

After a review of the public comments received, the following revisions to the proposed policy are submitted for your review and approval:

A. Revise the case determination terms to reflect the following:

VALID	- Abuse or neglect has been substantiated.

INVALID	- Abuse or neglect has been clearly ruled out.
UNCERTAIN	- Actual abuse or neglect cannot be substantiated or clearly ruled out, but there is enough evidence from investigation to establish a reasonable doubt that there may be abuse or neglect.
POTENTIAL	- Actual abuse or neglect cannot be substantiated, but there is sufficient evidence to identify that abuse or neglect is likely to occur as a result of existing conditions in the home which seriously threaten the child's physical or emotional well-being. In these instances, continuing social services are indicated to prevent the actual occurrence of abuse or neglect.
FAMILY MOVED	- Family moved before any of the above dispositions were made.

B. On invalidated cases the following identifying information is to be removed from the CANRIS file and the case record file: the individual's name, street address, DPW client number, and Social Security number.

Recommendations:

It is recommended that the Board approve this policy and its submission to *The Texas Register* to be effective on the earliest possible date.

Additionally, it is recommended that the Board instruct the Department as follows: (1) To report annually on the CANRIS system, particularly on the Uncertain and Moved categories as to whether multiple reports are received on individuals within these categories; and (2) To conduct a future study related to notification of adults who are registered on the CANRIS file.

Respectfully submitted,

s/s

Raymond W. Vowell

SD005

TEXAS DEPARTMENT OF PUBLIC WELFARE
VICTIM PROFILE INFORMATION
FOR THE PERIOD BEGINNING 12/03/73 AND ENDING 05/31/76

RUN DATE = 7/08/76
PAGE NBR = 1

ABUSE OR INJURY	VICTIM AGE 0-3	AGE 4-6	AGE 7-10	AGE 11-14	AGE 15-18	SEX MALE	SEX FEMALE	ETHNIC GROUP ANGLO	NEGRO	MEX/AMER	OTHER	PERPETRATOR RELATIONSHIP MOTHER	FATHER	OTHER RELATIVE	OTHER
BONE FRACTURE	200	24	16	15	3	152	106	130	61	55	12	177	147	6	20
BRAIN DAMAGE	26	2	1	0	0	20	10	15	8	7	0	20	13	0	6
BRUISES	1696	1331	1395	1325	724	3271	3203	3896	947	1430	203	3742	3784	431	543
BURNS	132	61	46	15	13	151	116	115	89	54	9	202	88	30	30
CONFINEMENT	45	22	30	25	13	62	73	69	10	41	15	103	72	6	12
DISLOCATION	9	0	0	1	2	4	8	4	3	4	1	8	8	2	1
DISMEMBERMENT	1	1	1	0	0	1	2	2	1	0	0	1	2	0	0
EMOTIONAL ABUSE	806	754	1007	1174	695	2172	2273	2839	616	846	144	3356	2469	316	162
EXPLOITATION	38	40	70	117	62	148	179	162	49	100	16	234	172	36	17
EXPOSURE	26	11	3	3	2	22	23	26	7	7	5	35	16	0	4
HEMATOMA, SUBDURAL	35	3	3	2	1	20	25	23	10	9	3	29	22	3	5
HEMORRHAGE, SUBDURAL	13	3	1	2	0	8	11	7	5	7	0	11	15	0	2
INTERNAL INJURIES	26	7	4	3	4	24	20	20	13	8	3	20	23	3	13
MALNUTRITION	304	72	38	27	5	247	199	172	93	169	12	428	234	27	6
POISONING	21	10	3	1	1	22	14	21	13	2	0	33	12	1	0
SCALDING	18	1	4	0	0	16	8	7	13	4	0	18	15	3	2
SEXUAL ABUSE	99	194	348	530	281	259	1195	931	200	263	60	544	1029	159	226
SKULL FRACTURE	58	3	1	0	1	41	22	24	20	17	2	38	29	0	10
SPRAINS	1	1	1	2	2	1	6	4	0	3	0	4	2	0	1
SUFFOCATION	2	0	0	0	0	1	1	1	0	1	0	0	2	0	0
WELTS	175	202	253	244	93	506	461	430	344	169	24	618	509	59	66
WOUNDS	100	71	110	104	60	236	209	173	181	81	10	273	215	25	28
TOTAL	3831	2813	3335	3590	1962	7384	8164	9071	2683	3277	519	9894	8878	1107	1154

SD005

TEXAS DEPARTMENT OF PUBLIC WELFARE
VICTIM PROFILE INFORMATION
FOR THE PERIOD BEGINNING 12/03/73 AND ENDING 05/31/76

RUN DATE = 07/08/76
PAGE NBR = 2

ABUSE OR INJURY	COURT ACTION						FATALITIES	PERPETRATOR AGE			
	PETITION NOT FILED	REQUEST TO FILE REFUSED	PETITION FILED	PETITION WITHDRAWN	CONSERVATOR APP	CONSERVATOR NOT APP		UNDER 18	18-25	26-40	OVER 40
BONE FRACTURE	97	2	71	13	73	2	7	27	202	106	7
BRAIN DAMAGE	15	0	3	2	9	0	17	3	20	15	1
BRUISES	5316	11	462	105	560	15	22	205	2064	4634	1347
BURNS	179	0	34	3	50	1	4	31	134	142	32
CONFINEMENT	105	0	10	2	18	0	1	1	48	98	42
DISLOCATION	7	0	2	0	3	0	0	1	15	2	0
DISMEMBERMENT	3	0	0	0	0	0	1	0	1	2	0
EMOTIONAL ABUSE	3503	1	338	57	526	16	2	70	827	3562	1698
EXPLOITATION	246	4	27	4	43	3	0	6	42	245	152
EXPOSURE	26	0	8	1	10	0	2	6	22	20	5
HEMATOMA, SUBDURAL	23	1	9	0	11	0	7	4	37	17	0
HEMORRHAGE, SUBDURAL	12	0	1	0	6	0	6	2	7	14	4
INTERNAL INJURIES	25	0	6	1	9	0	20	1	28	23	5
MALNUTRITION	282	0	56	8	92	3	11	26	297	250	103
POISONING	19	0	9	1	7	0	0	3	13	28	0
SCALDING	13	0	5	1	4	0	4	4	15	16	2
SEXUAL ABUSE	932	3	221	9	283	4	0	98	194	1065	553
SKULL FRACTURE	29	0	16	1	15	0	13	15	44	17	1
SPRAINS	4	0	2	0	1	0	0	0	2	2	2
SUFFOCATION	1	0	0	0	1	0	1	0	0	2	0
WELTS	781	1	63	16	99	6	0	14	248	747	218
WOUNDS	315	0	47	5	72	4	7	10	127	291	96
TOTAL	11933	23	1390	229	1892	54	125	527	4387	11298	4268

A-304

SD005

TEXAS DEPARTMENT OF PUBLIC WELFARE
VICTIM PROFILE INFORMATION
FOR THE PERIOD BEGINNING 12/03/73 AND ENDING 05/31/76

RUN DATE = 07/08/76
PAGE NBR = 3

NEGLECT	VICTIM											PERPETRATOR RELATIONSHIP			
	AGE 0-3	AGE 4-6	AGE 7-10	AGE 11-14	AGE 15-18	SEX MALE	SEX FEMALE	ETHNIC GROUP ANGLO	ETHNIC GROUP NEGRO	ETHNIC GROUP MEX/AMER	ETHNIC GROUP OTHER	MOTHER	FATHER	OTHER RELATIVE	OTHER
ABANDONMENT	996	570	510	457	258	1434	1360	1409	528	734	123	2410	905	87	75
EDUCATIONAL	99	453	1318	1647	675	2034	2167	1900	730	1462	109	3617	1872	243	53
MEDICAL	1729	891	916	579	215	2207	2130	1613	877	1743	104	3919	1974	246	66
PHYSICAL	4048	2771	3217	2403	922	6823	6553	6909	2376	3741	351	11773	6517	762	272
LACK OF SUPERVISION	4142	3946	5138	4569	1851	10294	9364	9665	3965	5444	588	17309	6886	958	441
TOTAL	11014	8631	11099	9655	3921	22792	21574	21495	8476	13124	1275	39028	18154	2296	907

A-305

NEGLECT	COURT ACTION						FATALITIES	PERPETRATOR AGE			
	PETITION NOT FILED	REQUEST TO FILE REFUSED	PETITION FILED	PETITION WITHDRAWN	CONSERVATOR APP	CONSERVATOR NOT APP		UNDER 18	18-25	26-40	OVER 40
ABANDONMENT	1604	8	453	65	649	4	5	103	1064	1666	500
EDUCATIONAL	3938	0	94	7	157	4	0	24	252	3346	1996
MEDICAL	3704	4	219	34	357	9	46	192	1692	3057	1145
PHYSICAL	11567	10	609	91	1062	24	20	320	4018	10524	4136
LACK OF SUPERVISION	17454	9	850	165	1158	14	37	295	4272	15616	4809
TOTAL	38267	31	2225	362	3383	55	108	934	11298	34209	12586

PERPETRATOR'S RELATIONSHIP TO THE VICTIM

VICTIM AGE AND SEX	MOTHER FIGURE UNDER 18	MOTHER FIGURE 18-25	MOTHER FIGURE 26-40	MOTHER FIGURE OVER 40	FATHER FIGURE UNDER 18	FATHER FIGURE 18-25	FATHER FIGURE 26-40	FATHER FIGURE OVER 40	OTHER RELATIVE UNDER 18	OTHER RELATIVE 18-25	OTHER RELATIVE 26-40	OTHER RELATIVE OVER 40	NOT RELATED UNDER 18	NOT RELATED 18-25	NOT RELATED 26-40	NOT RELATED OVER 40	TOTAL
0 - 3																	
M	326	2985	1922	165	19	1006	1208	287	31	86	56	114	35	117	83	34	8475
F	295	2643	1778	166	20	839	1108	291	27	58	57	94	31	95	118	32	7652
4 - 6																	
M	16	1331	2451	263	9	268	1274	358	16	42	47	138	18	48	80	23	6382
F	5	1185	2271	259	4	214	1086	389	20	38	36	78	12	40	70	23	5730
7 -10																	
M	5	452	3723	604	8	84	1679	832	36	38	41	193	18	43	75	39	7870
F	14	384	3465	597	5	87	1497	732	33	48	46	166	6	25	71	30	7206
11-14																	
M	5	39	2868	930	6	27	1225	1102	29	64	56	167	2	26	61	42	6649
F	10	44	3059	960	7	15	1383	1180	38	72	62	186	4	29	66	40	7155
15-18																	
M	3	8	906	496	5	2	418	609	7	27	26	45	1	3	12	14	2582
F	10	8	1160	673	8	16	618	864	9	65	47	76	2	15	22	29	3622
TOTAL	689	9080	23603	5113	91	2558	11496	6644	246	538	474	1257	129	441	658	306	63323

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

VOLUME I

APPENDIX

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,

v.

JOHN PLEASANT SIMS, ET AL.

* * *

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT FILED JULY 3, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

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ARTICLE 1
CIVIL DOCKET

ARTICLE 1, DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/19/76	1.	Complaint. filed. No service at this time per Attorney.
4/20/76	2.	(JVS) ORDER, filed, denying Pltfs' motion for a temporary restraining order. A hearing shall be held on pltfs' application for a preliminary injunction on Thursday, April 29, 1976 at 10:30 a.m. Issued Summons and Writs to Serve
5-5-76	8.	(JVS) HEARING BEFORE THE COURT: Testimony of witnesses. Argument of counsel. COURT'S RULING: There is no pending Section 17 law suit. There is pending a Section 1106 law suit. No disposition has been made of that suit. The children are not in the legal custody of the Harris County Welfare Dept. and it is ordered that they be returned to their parents immediately, subject to further orders of this court. A request will be made for the constitution of a 3-judge court to determine the constitutionality of the State statute.
5-5-76	10.	DEFENSE, filed.
5-11-76	11.	Defts' ANSWER, filed.
5-18-76	12.	(JRB) ORDER, filed, setting up a three judge court consisting of John V. Singleton, Jr., Ross N. Sterling and Joe Ingraham. Parties ntfd. jb
5-21-76	13.	(JVS) ORDER, filed, signed 5-5-76. No pending law suit pursuant to any

		provisions of Chapter 17, Title 2, Texas Family Code; children will be returned to their parents immediately and a 3-judge court will be requested to hear the matter on the merits. Parties ntfd.
5-21-76	14.	APPLICATION FOR TEMPORARY RESTRAINING ORDER, filed.
5-21-76	15.	(JVS) TEMPORARY RESTRAINING ORDER, filed, restraining defts from picking up children. Hearing set June 1, 1976 at 9:30 A.M. Served by counsel for plaintiffs.
5-27-76	17.	(JVS) ORDER, filed, postponing the hearing set on June 1, 1976 until such time as the three-judge court can be convened. The temporary restraining order shall remain in force until the hearing and determination by the full court. Parties ntfd. rm.
6-7-76	18.	(JVS) (JI) (RNS) HEARING: Leave granted to file motions to intervene within 24 hours. Argument of counsel. Leave to amend complaint granted. Defts have 10 days to answer. Parties to proceed with discovery regarding Chapters 11, 17 and 34 of the Family Code and file agreed stipulations of fact and briefs by 5:00 P.M. July 30, 1976. Hearing before this 3-judge court set August 4, 1976 at 9:30 A.M.
6-7-76	21.	(JVS) ORDER GRANTING LEAVE TO AMEND COMPLAINT AND TO

PROCEED ON MOTION FOR PRELIMINARY INJUNCTION UPON COMPLAINT AS AMENDED, filed. Defts have until June 17, 1976 to answer amended complaint. Parties ntfd. rm.

6-7-76 22. MOTION FOR LEAVE TO FILE AMENDED PLEADING AND THAT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION BE HEARD UPON COMPLAINT AS AMENDED, filed.

6-7-76 23. FIRST AMENDED COMPLAINT, filed. Issued (8) Summons on Marian Lockley, Raul Jimenez, Garrett Morris, Hilmar G. Moore, Marie L. Surgi, Norma Kay Estes, Thereasa J. Rhea and Gloria Jones.

6-17-76 28. Defts' Raul Jimenez, Jamie Clements, Hilmar G. Moore, Raymond Vowell, Gene Lege, Marian Lockley and Marie L. Surgi, FIRST AMENDED ANSWER to Pltfs' First Amended Complaint, filed.

6-18-76 29. (JVS) (JI) (RNS) ORDER OF PRELIMINARY INJUNCTION, filed. Defts are hereby restrained and enjoined from June 7, 1976 until this three Judge Court makes its determination of the constitutionality of the state statutes, unless extended by further order of the Court, from filing or prosecuting any state suit based on the applicable state statutes as challenged by the pltfs. Parties ntfd. jb

6-24-76 40. Defts' MOTION FOR MORE DEFINITE STATEMENT, filed. (UNOPPOSED PER LETTER)

7-16-76 58. Deft State Department of Public Welfare's MOTION PURSUANT TO RULE 17 (c), FRCP, filed. (To be heard at August 4th's hearing)

7-21-76 61. MOTION FOR CONSOLIDATION OF ACTIONS, filed. (Pltfs in CA 76-H-1120 entitled Woods, et al vs. State Department of Public Welfare, et al, want to consolidate with this case)

7-29-76 68. (JVS) DOCKET ENTRY, filed and entered, granting the filing of (1) a motion to consolidate this action with CA 76-H-1120; (2) a motion to dismiss the deft school teachers; (3) a motion to dismiss the deft Judge Lowry; (4) a motion to dismiss the deft Judge Coker; and (5) a motion by the State Department of Public Welfare; so that they will be considered by the Three-Judge Court's hearing set for August 4, 1976. All counsel concerned are reminded of the need for a stipulation on all relevant facts. Such stipulations should be filed no later than August 3, 1976. Parties ntfd. jb

8-4-76 72. Deft State Department of Public Welfare's MOTION TO DISMISS, filed.

8-4-76 (JVS) HEARING ON MOTIONS: Argument of counsel. Motion to consolidate with the Woods case denied except that the portion of the Woods

case dealing with appointment of counsel for indigent parents is consolidated. Motion to dismiss judges and teachers individually was granted. Motion for appointment of guardian ad litem denied. State's motion to dismiss the case will be heard by the full court.

8-9-76 80. (JVS) (RNS) (JI) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, filed, dismissing defts Gloria Jones, Theresa J. Rhea and Norma Kay Estes. Parties ntfd. rm.

8-16-76 84. (JVS) (RNS) (JMI) ORDER OF DISMISSAL OF DEFENDANT, ERNEST COKER, SR., filed and entered. Parties ntfd. jb

10-6-76 114. (JVS) ORDER, filed, Denying Plaintiffs MOTION FOR LEAVE TO AMEND. Parties ntfd. ad

10-7-76 115. (JVS) ORDER, filed, denying Defendants' MOTION for PROTECTIVE ORDER. Parties ntfd. ad

10-12-76 119. Defts' RESPONSE TO ORDER of OCTOBER 7, 1976, filed.

10-13-76 121. (JVS) ORDER, filed, The State Department of Public Welfare's Motion to Dismiss DENIED. Parties ntfd.

10-15-76 124. (JI) (JVS) (RNS), ORDER, filed. Dismissed as to defendant Robert L. Lowry, Judge of the Juvenile Court of

Harris County, Texas, as of October 15, 1975. Parties ntfd.

10-18-76 125. (JVS) (RNS) (JI), ORDER, filed. Consolidating 76-H-665 with 76-H-1120 for trial on the issue of whether there is a constitutional right to court appointed counsel for indigent parents in proceedings whereby the parent-child relationship may be temporarily or permenantly (sic) terminated. Parties ntfd. ad

10-19-76 126. MEMORANDUM in SUPPORT of PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, filed.

10-19-76 127. TRIAL BRIEF OF PLAINTIFFS, filed.

10-19-76 128. Defendants' PROPOSED FINDINGS OF FACT, filed.

10-19-76 129. Defendants' PROPOSED CONCLUSIONS OF LAW, filed.

10-19-76 131. (JVS) ORDER, filed. Defendant MARIE L. SURGI'S MOTION TO DISMISS for Failure to State a Claim Upon Which Relief Can Be Granted, and the same is hereby, granted and the plaintiffs have and recover nothing by their suit against said defendant. Cost herein is to be borne by the plaintiffs. Parties ntfd. ad

10-26-76 (JVS)(JI)(RNS) HEARING: Opening statements. Offer of exhibits. Oral

arguments. *Pltf's offer of evidence:* Depositions of John P. Sims and Mary Carter Sims; James J. Carter; Myrtle Jean Carter, Rex Downing; Dr. Perry; Dr. Hanby, Judge Lowrey; Mr. Vowell's Answers to Interrogatories and Transcripts of previous hearings. *Defts' offer of evidence:* Depositions of Gladys Goffney; Dr. Johnstone; Dr. Smith; Juana Falcon, Gloria Jones and Theresa Rhea. Briefs due in 20 days. Reply briefs 10 days thereafter.

10-12-77 143. (JVS) (JI) (RNS) OPINION, filed. (See instrument for details.)

2-23-78 146. (JI) (JVS) (RNS) JUDGMENT, filed. (See instrument for details.) Parties ntfd. rm.

3-8-78 148. (JI) (JVS) (RNS) AMENDED JUDGMENT, filed. Parties ntfd. rm.

4-20-78 153. Def's NOTICE OF APPEAL TO THE SUPREME COURT fld. (copy ret'd to Appellant's Atty)

ARTICLE 2

COMPLAINT

ARTICLE 2, COMPLAINT

I.

This is a civil action seeking declaratory, injunctive and equitable relief. Plaintiffs seek an injunction against the deprivation, under color of the laws of the State of Texas, of their rights, privileges and immunities guaranteed under the United States Constitution. Jurisdiction is invoked pursuant to 28 U.S.C. §§1343, 2201, 2202, 2281, 2284; 42 U.S.C. §§1981 and 1983 and the Constitution of the United States, more particularly Article I, Section 9 thereof and the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments thereto.

This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States certain Statutes of the State of Tecas (sic), namely: Title 2, Texas Family Code, Chapter 17 (Suit For Protection Of Child In Emergency) and the applicable provisions of Chapter 11 (General Provisions) and Chapter 14 (Conservatorship, Possession And Support Of Children) as used by Defendants in conjunction with the provisions of said Chapter 17, Title 2, Texas Family Code to deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution and laws of the United States.

II.

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284, since Plaintiffs seek an injunction to restrain the enforcement, operation and execution of certain Statutes of the State of Texas which have statewide application, on the grounds that said Statutes are violative of the Constitution and laws of the United States.

III.

The adult Plaintiffs are citizens of the United States and of the State of Texas, residing in Montgomery County, Texas, and are the parents of the minor Plaintiffs.

Likewise, the minor Plaintiffs are citizens of the United States and of the State of Texas, each of whom is presently illegally restrained in Harris County, Texas, in the custody of Defendant HARRIS COUNTY CHILD WELFARE UNIT OF THE STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS. Prior to such illegal restraint by Defendants herein, the minor Plaintiffs resided with the adult Plaintiffs in Montgomery County, Texas.

IV.

1) Defendant STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS exists pursuant to the laws of the State of Texas as a governmental agency vested by Acts of the Texas Legislature with power and authority to make and enforce rules and regulations for carrying into effect the laws and policies of the State of Texas relating to a public welfare program. This Defendant will hereinafter be referred to as TEXAS DEPARTMENT OF PUBLIC WELFARE.

2) Defendant RAYMOND VOWELL is Commissioner of the State Department of Public Welfare of the State of Texas, with offices in Austin, Travis County, Texas; is chief administrative officer of such governmental agency whose duties include statewide administration of the Texas public welfare program; and who is directly in charge of the local agencies or units of such State Department located throughout the State of Texas. This Defendant will hereinafter be referred to as VOWELL.

3) Defendant HARRIS COUNTY CHILD WELFARE UNIT OF THE STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS is the local agency of the State Department of Public Welfare for Harris County, Texas, with offices in Houston, Harris County, Texas, and is under the direct supervision and control of Defendant VOWELL. This Defendant will hereinafter be referred to as Defendant HARRIS COUNTY CHILD WELFARE.

4) Defendant GENE LEGE is Director of the Harris County Child Welfare Unit Of The State Department Of Public Welfare Of The State Of Texas, with offices in Houston, Harris County, Texas, and is chief administrative officer of such local agency whose duties include administration of the Texas public welfare program in and for Harris County, Texas, under the direct supervision and control of Defendant VOWELL. This Defendant will hereinafter be referred to as Defendant LEGE.

5) Defendant ROBERT L. LOWRY is the duly elected, qualified and acting Judge of the Juvenile Court Number One of Harris County, Texas, with offices in Houston, Harris County, Texas. This Defendant will hereinafter be referred to as Defendant LOWRY.

6) Defendant ERNEST A. COKER, SR. is the duly elected, qualified and acting Judge of the District Court of Montgomery County, Ninth Judicial District of the State of Texas, with offices in Conroe, Montgomery County, Texas.

7) Each Defendant is sued individually and in his official capacity. Relief is sought against each and all Defendants, as well as their agents, assistants, sucessors (sic), employees and all persons acting in concert or cooperation with them or at their direction.

V.

1) At all times relevant hereto the adult Plaintiffs have maintained a residence in Montgomery County, Texas; were and are employed in Harris County, Texas; and transported the three minor Plaintiffs with them daily from their said residence in Montgomery County, Texas, to attend John G. Osborne Elementary School in Houston, Harris County, Texas, for which the adult Plaintiffs have and are paying the sum of $159.00 per month tuition to the Houston Independent School District located in Harris County, Texas.

2) On March 25, 1976, while the three minor Plaintiffs were in Harris County, Texas, attending school, Defendant HARRIS COUNTY CHILD WELFARE, acting under color of §17.01, Title 2, Texas Family Code, took physical possession, custody and control of said minor Plaintiffs without notice to the adult Plaintiffs and without having obtained authority of a magistrate therefor.

3) Thereafter and on March 26, 1976, Defendant LOWRY, action under color of §17.04, Title 2, Texas Family Code entered ex parte Orders by the terms of which Defendant HARRIS COUNTY CHILD WELFARE was awarded possession, custody, care and control of the three minor Plaintiffs for a ten-day period.

4) Still later and on April 5, 1976, adult Plaintiffs made application to Defendant LOWRY for a Writ Of Habeas Corpus seeking return to them of their three minor children, which application was denied without hearing thereon, although adult Plaintiffs urged for hearing, subpoenaed witnesses therefor, and also made known to Defendants LOWRY and HARRIS COUNTY CHILD WELFARE that all Plaintiffs herein are and were residents of Montgomery County, Texas, the proper situs for any cause of action.

5) On the same date, April 5, 1976, although apprised of the place of residence of the three minor Plaintiffs, Defendant LOWRY instructed Defendant HARRIS COUNTY CHILD WELFARE to file his his (sic) Court a Petition To Terminate The Parent-Child Relationship, under color of the applicable provisions of Chapters 11, 14 and 17, Title 2, Texas Family Code, which Petition was, in fact, filed on said date. Based upon such filing and without jurisdiction or venue, Defendant LOWRY again entered ex parte Temporary Orders whereby physical possession, care, custody and control of the three minor Plaintiffs was continued in Defendant HARRIS COUNTY CHILD WELFARE.

6) Thereafter and at a date unknown to the adult Plaintiffs, Defendant LOWRY again entered an ex parte Order whereby the Petition filed by Defendant HARRIS COUNTY CHILD WELFARE on April 5, 1976, was transferred to the Court of Defendant COKER in Montgomery County, Texas, but set no date for hearing thereon.

7) Adult Plaintiffs would particularly show unto the Court that at the date of filing of this Complaint, they have not been served with any process, citation or notice of hearing, nor have they been afforded a hearing, either by the Court of Defendant LOWRY or the Court of Defendant COKER, and their three minor children remain in the physical possession, care, custody and control of Defendant HARRIS COUNTY CHILD WELFARE.

8. All Plaintiffs would further particularly show unto the Court that since March 25, 1976, up to the date of filing of this Complaint that Defendant TEXAS DEPARTMENT OF PUBLIC WELFARE, acting by and through its local agency, HARRIS COUNTY CHILD WELFARE, has caused all three minor plaintiffs to be absent from school, despite the fact that

all three are subject to the compulsory school attendance laws of the State of Texas; has refused to advise the adult Plaintiffs of the whereabouts of the three minor Plaintiffs; has refused to produce the minor Plaintiffs for medical examination by doctors of adult Plaintiffs' choice; has refused to allow adult Plaintiffs access to minor Plaintiffs; has incurred hospitalization and medical expenses for said minor Plaintiffs and has charged same to the account of adult Plaintiffs without authorization therefor; has placed one of the minor Plaintiffs in a foster home with a foster parent who is poisoning the mind of the minor Plaintiff PAUL EDWARD SIMS against his parents; by causing the minor Plaintiffs to be absent from school where they were regularly enrolled, have deprived adult Plaintiffs of property, namely, the tuition paid for such schooling, and have done so without affording adult Plaintiffs notice and due process of law; further, has required adult Plaintiffs to attend counseling selected by said Defendants for which adult Plaintiffs are advised they will be required to pay; and still further, have required adult Plaintiffs to be interviewed by a psychologist of said Defendants' choice, but for which adult Plaintiffs have been advised they will be required to pay. Defendant TEXAS DEPARTMENT OF PUBLIC WELFARE, acting by and through personnel of its local agency, Defendant HARRIS COUNTY CHILD WELFARE, has also advised adult Plaintiffs, among other things, that "If they [adult Plaintiffs] cooperate, Defendants will, perhaps, agree to return minor Plaintiffs to their custody within 60 days to 6 months." Such action toward adult Plaintiffs constitutes intimidation, duress and coercion by said Defendants under color of law.

VI.

Title 2, Texas Family Code, Chapter 17 on its fact (sic) and as used in conjunction with the applicable provisions of

Title 2, Texas Family Code, Chapters 11 and 14, and applied to all the Plaintiffs herein violates and is repugnant to the Constitution of the United States, as follows:

1) The Statutes on their face and as applied to Plaintiffs violate the First Amendment to the United States Constitution, in that the operation of the Statutes creates a chilling effect upon all the Plaintiffs in their exercise of freedom of speech, freedom of association, and right to petition for a redress of grievances.

2) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment because they are void for vagueness and sweep constitutionally protected rights within their scope and application.

3) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth Amendment of the United States Constitution in that the operation of the Statutes invades their fundamental human rights to family unity and privacy by allowing seizure of the three minor Plaintiffs without notice to the adult Plaintiffs and without a duly authorized warrant for such seizure.

4) The Statutes on their face and as applied to all the Plaintiffs violate the due process clause of the Fifth and Fourteenth Amendments, in that they are void for vagueness and are uncertain, and give unconstitutional effect to acts, procedures, policies, practices and customs of State governmental agencies which violate the procedure and substantive "due process rights" of the adult Plaintiffs as additionally guaranteed by the Fifth and Sixth Amendments to the Constitution, in that the adult Plaintiffs have been denied their constitutionally-guaranteed rights solely upon information of a State governmental agency.

5) The Statutes on their face and as applied to all the Plaintiffs violate the Fifth, Sixth and Fourteenth

Amendments, in that they unconstitutionally delegate judicial authority to a State governmental agency which "in the opinion of that State governmental agency" allows such agency to make determinations that totally destroy the fundamental human rights, family unity and family privacy of Plaintiffs.

6) The Statutes on their face and as applied to all the Plaintiffs violate the self-incrimination clause of the Fifth Amendment in that Defendants TEXAS DEPARTMENT OF PUBLIC WELFARE and HARRIS COUNTY CHILD WELFARE, by inferring that cooperation on the part of adult Plaintiffs will result in Defendants' return of their minor children, elicit and obtain information and evidence which could later be used against adult Plaintiffs. In short, under color of law, said Defendants are able to coerce and intimidate the adult Plaintiffs by veiled promises to return their children.

7) The Statutes on their face and as applied to the adult Plaintiffs violate their Sixth Amendment rights to confrontation of witnesses and a speedy hearing.

8) The Statutes on their face and as applied to the three minor Plaintiffs not only violate their Sixth Amendment rights to a speedy hearing, but also their rights to counsel from the instant of seizure by Defendants.

9) The Statutes on their face and as applied to all the Plaintiffs violate their First, Ninth and Tenth Amendment rights, in that they infringe upon the category of fundamental human rights reserved by law to individuals.

10) The Statutes on their face and as applied to the adult Plaintiffs violate their Fourteenth Amendment rights by depriving them of property without due process of law.

11) The Statutes on their face and as applied to the minor Plaintiffs violate Article I, Section 9 and the Sixth and Fourteenth Amendments to the Constitution, in that said Statutes, as applied, suspend their privilege to the Writ Of Habeas Corpus, deprive them of their right to counsel while under seizure, and further deprive them of their liberty without due process of law.

12) Title 2, Texas Family Code, §17.09 on its face is repugnant to the First and Fourteenth Amendments of the Constitution in its attempt to deprive all the Plaintiffs of redress for grievance and deprivation of property and further attempts to insulate Defendants from accountability and responsibility for their acts.

VII.

Solely as a result of the grievances hereinabove specifically complained of, all of the Plaintiffs have suffered and will continue to suffer mental anguish, humiliation, embarrassment, and damage to reputation in the communities where they reside and are employed and/or attend public school, destruction of their family unity and privacy, and deprivation of property, for which they each here seek redress from Defendants in the present amount of $20,000 each.

VIII.

Accordingly, unless and until the injunctive relief in this Complaint is granted, Plaintiffs have good reason to believe and do believe their rights to freedom of speech, freedom of association, freedom of family privacy, rights to due process of law, rights to petition for a redress of grievances, the rights to counsel of minor Plaintiffs, and the fundamental human rights specifically reserved unto the people will continue to be infringed, abridged, chilled, threatened, impeded and otherwise interfered with. The relief demanded is essential to prevent interference with and deprivation of

Plaintiffs' constitutional rights. Therefore, unless the relief demanded is granted, Plaintiffs will suffer the most serious immediate and irreparable injury, in that their family unit will be totally destroyed because of deprivation of their most fundamental federal constitutional rights, for which Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that the Court will with all expediency take all steps necessary to convene a three-judge panel, hear this action at the earliest practicable date, advance this case on the docket, cause this case in every way to be expedited and heard, and upon such hearing, pray the Court to:

1) Issue a declaratory judgment declaring that Title 2, Texas Family Code, Chapter 17 and the applicable provisions of Title 2, Texas Family Code, Chapters 11 and 14 as used by Defendants in conjunction with the provisions of said Chapter 17, Title 2, Texas Family Code and applied to Plaintiffs in violation of the Constitution of the United States, are null and void on their face; and,

2) Order and direct each, every and all of the Defendants herein to deliver over instanter to Plaintiffs JOHN PLEASANT SIMS and Wife, MARY CARTER SIMS the physical possession, care, custody and control of the three minor Plaintiffs, SABRINA MARIE SIMS, PAUL EDWARD SIMS and SHAWANA EVETTE SIMS.

3) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from use, operation, enforcement, execution and application of Title 2, Texas Family Code, Chapter 17 and the applicable provisions of Title 2, Texas Family Code, Chapters 11 and 14 used in conjunction with the provisions of Title 2, Texas Family

Code, Chapter 17, and from implementing and/or adopting rules, regulations and policies pursuant thereto; and,

4) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from impeding, abridging, intimidating, chilling, hindering, preventing, threatening, deterring, discouraging and otherwise interfering with Plaintiffs in their exercise of the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States; and,

5) Award to each of the Plaintiffs as redress for damages to their persons and property judgment against Defendants in the sum of $20,000.00 each; and,

6) Award to the undersigned attorneys for Plaintiffs judgment against Defendants for reasonable attorney fees for services rendered herein; and,

7) Allow Plaintiffs to recover from Defendants their costs herein, and award to Plaintiffs such other relief as appears to the Court necessary, equitable or just herein.

ARTICLE 3

ANSWER

ARTICLE 3, ANSWER

Now come defendants, State Department of Public Welfare of the State of Texas, Harris County Child Welfare Unit of the State Department of Public Welfare of the State of Texas, Raymond Vowell, Commissioner of the State Department of Public Welfare of the State of Texas, and Gene Lege, Director of the Harris County Child Welfare Unit of the State Department of Public Welfare of the State of Texas, defendants herein, and file this their answer to the complaint and for such answer would respectfully show the Court the following:

1. Defendants admit the allegations contained in Part I of the Complaint insofar as they characterize the type of suit brought but otherwise defendants deny the allegations contained in Part I.

2. Defendants admit the allegations contained in Part II of the Complaint.

3. Defendants admit the allegations contained in the first paragraph of Part III of the complaint but deny the allegation contained in the second paragraph of Part III that the minor plaintiffs are illegally restrained in Harris County by the defendants.

4. Defendants admit the allegations contained in Part IV, paragraphs 1 through 7 of the complaint except insofar as paragraph 7 implies liability on behalf of the defendants and their agents, assistants, successors, employees and all persons acting in concert or cooperation with them or at their direction.

5. In answer to the factual allegation contained in Part V of the complaint, defendants respond as follows:

a. Defendants admit the allegations contained in paragraph 1;

b. Defendants admit the allegations contained in paragraph 2 except that they deny that they took physical possession, custody and control of said minor plaintiffs without notice to the adult plaintiffs;

c. Defendants admit the allegations contained in paragraph 3;

d. Defendants admit the allegations contained in paragraph 4 except that they deny that there was no hearing at all on the writ of habeas corpus;

e. Defendants admit the allegations contained in paragraph 5 except that they deny that Judge Lowry entered the referenced orders without jurisdiction;

f. Defendants admit the allegations contained in paragraph 6 and note that the transfer was ordered on April 6, 1976;

g. Defendants admit the allegations contained in paragraph 7 except to refer to paragraph "e" above which indicates their denial that there was no hearing at all on the writ of habeas corpus; and

h. Defendants deny the allegations insofar as they are identifiable in paragraph 8.

6. Defendants deny the allegations which consist of legal conclusions in Part VI, including paragraphs 1 through 12.

7. Defendants deny the allegations contained in Part VII.

8. Defendants deny the allegations contained in Part VIII.

Wherefore, defendants pray that the Court deny all relief requested by the plaintiffs and grant the

defendants any further relief to which they may show themselves entitled, including recovery of costs.

ARTICLE 4

FIRST AMENDED COMPLAINT

ARTICLE 4, FIRST AMENDED COMPLAINT

Pursuant to leave granted by Order of this Court on the 5th day of June, 1976, Plaintiffs file herewith their First Amended Complaint:

I.

This is a civil action seeking declaratory, injunctive and equitable relief. Plaintiffs seek an injunction against the deprivation, under color of the laws of the State of Texas, of their rights, privileges, liberties and immunities guaranteed under the United States Constitution.

The jurisdiction of this Court is invoked under:

(a) 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C. §§1981 and 1983; and the rights, privileges and immunities secured to Plaintiffs by Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States;

(b) This Court's pendent jurisdiction, this being an action wherein the state and federal claims derive from a common nucleus of operative fact and are such that Plaintiffs would ordinarily be expected to try them all in a single judicial proceeding.

This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States certain Statutes of the State of Texas, namely: Title 2, Texas Family Code, Chapter 34 (Report Of Child Abuse); Chapter 17 (Suit For Protection Of Child In Emergency); Chapter 11 (General Provisions); Chapter 14 (Conservatorship, Possession And Support Of Children); and Chapter 15 (Termination Of The Parent-Child Relationship), both on their face and as applied by

Defendants to deprive Plaintiffs of the rights, privileges, liberties and immunities secured to them by the Constitution and laws of the United States.

II.

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284, since Plaintiffs seek an injunction to restrain the enforcement, operation and execution of certain Statutes of the State of Texas which have statewide application, on the grounds that said Statutes are violative of the Constitution and laws of the United States.

III.

1) All of the Plaintiffs are citizens of the United States and of the State of Texas, residing in Montgomery County, Texas.

2) The minor plaintiff SABRINA MARIE SIMS is the natural child of the adult plaintiffs, born to them August 16, 1967, and now age 8 years.

3) The minor plaintiff PAUL EDWARD SIMS was born December 10, 1967, is now age 8 years, and was adopted by the adult plaintiffs through the Harris County Child Welfare Unit of the Texas State Department of Public Welfare pursuant to Decree Of Adoption granted July 18, 1974, by the Juvenile Court Number One of Harris County, Texas.

4) The minor plaintiff SHAWANA EVETTE SIMS was born March 2, 1969, is now age 7 years, and was adopted by the adult plaintiffs through the Harris County Child Welfare Unit of the Texas State Department of Public Welfare pursuant to Decree Of Adoption granted August 12, 1975, by the Juvenile Court Number One of Harris County, Texas.

5) At the time of filing of the original Complaint herein on April 19, 1976, all three minor plaintiffs were illegally restrained by Defendant GENE LEGE. That such illegal restraint began with the seizure of the minor plaintiffs on March 25, 1976, and continued until May 5, 1976, when this Court ordered return of said minor plaintiffs to the possession of the adult plaintiffs after a separation of 42 days. That such seizure and illegal restraint of the minor plaintiffs was under color of provisions of Chapters 17, 34, 11, 14 and 15 of Title 2, Texas Family Code, to which Plaintiffs herein make constitutional challenge.

IV.

1) The Texas Public Welfare Act of 1941, Title 20A Vernon's Ann.Civ.St. Art. 695c, as amended, created the Texas State Board of Public Welfare. Such enactment of the Texas Legislature further provides that said Board, its agents, representatives, and employees shall constitute the Texas State Department Of Public Welfare.

The following Defendants, all of whom reside in the State of Texas, are each sued individually and in their official capacities, which are as follows:

a) RAUL JIMENEZ is Chairman; GARRETT MORRIS and HILMAR G. MOORE are Members constituting the Texas State Board Of Public Welfare, which Board is reponsible for the adoption of all policies, rules and regulations for the government of the Texas State Department Of Public Welfare in the administration of welfare activities of the State of Texas;

b) RAYMOND VOWELL is Commissioner of the Texas State Department Of Public Welfare, made responsible by said Act of

the Texas Legislature for discharging all executive and administrative functions of said Department;

c) GENE LEGE is Director of the Harris County Child Welfare Unit of the Texas State Department of Public Welfare, responsible for the local administration of the child welfare progarm (sic) in and for Harris County, Texas, under the direct control and supervision of said Board and Commissioner;

d) MARIAN LOCKLEY is Head Program Director of the Montgomery County Welfare Unit of the Texas State Department Of Public Welfare, responsible for the local administration of the public welfare program, including child welfare, in and for Montgomery County, Texas, under the direct control and supervision of said Board and Commissioner.

All of the six (6) foregoing-named Defendants will hereinafter be referred to collectively as THE STATE DEPARTMENT.

2) Defendant ROBERT L. LOWRY, in his official capacity, is the duly elected, qualified and acting Judge of the Juvenile Court Number One of Harris County, Texas, who is also sued individually.

3) Defendant ERNEST A. COKER, SR., in his official capacity, is the duly elected, qualified and acting Judge of the Juvenile Court of Montgomery County, Texas, who is also sued individually.

4) Defendant MARIE L. SURGI is a licensed, practicing physician with offices in Harris County, Texas, one of which is located on the premises of THE

STATE DEPARTMENT located at 4040 Milam Street in Houston, Texas, and is sued solely in her individual capacity.

5) Defendant GLORIA JONES is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

6) Defendant THERESA J. RHEA is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

7) Defendant NORMA KAY ESTES is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

V.

1) At all times relevant hereto the adult plaintiffs have maintained a residence in Montgomery County, Texas; were and are employed in Houston, Harris County, Texas; and transported the three minor plaintiffs with them daily from their said residence in Montgomery County, Texas, to attend John G. Osborne Elementary School in Houston, Harris County, Texas, for which the adult plaintiffs pay the sum of $159.00 per month tuition to the Houston Independent School District, a public school system.

2) On the morning of March 25, 1976, after classes had convened, the adult plaintiff JOHN PLEASANT SIMS went to John G. Osborne Elementary School where his three minor children were regularly enrolled for the purpose of taking them lunch money. While there, Defendant RHEA, the regular classroom teacher for minor plaintiff PAUL EDWARD SIMS, complained to his father about misbehavior and class disruptions on the part of the minor plaintiff PAUL. Acting on such information, said adult plaintiff SIMS requested and was furnished a paddle by Defendant RHEA, took the minor plaintiff PAUL to a vacant classroom

accompanied by Defendant RHEA, and spanked the child in the presence of Defendant RHEA because of her complaints about the misbehavior of said child, then left the school premises.

3) At around noon on March 25, 1976, one Rex Downing, an agent and employee of THE STATE DEPARTMENT, went to said elementary school, acting on telephone information from Defendant GLORIA JONES, the Principal of said school and immediate supervisor of Defendant RHEA, that the minor plaintiff PAUL EDWARD SIMS had been abused by his parents, which information had been communicated to Defendant JONES by Defendant RHEA, since Defendant JONES had not been present when the spanking above described had occurred. Then and there, THE STATE DEPARTMENT, acting by and through its agent and employee Rex Downing, took physical possession, custody and control of all three minor plaintiffs without prior notice to the adult plaintiffs and without prior authority or writ of a magistrate therefor, under color of the provisions of Chapters 34 and 17, Title 2, Texas Family Code.

4) Later on the same date, March 25, 1976, the three minor plaintiffs were taken to offices of THE STATE DEPARTMENT located at 4040 Milam Street, Houston, Texas, and there examined by Defendant MARIE L. SURGI in an office maintained by Defendant SURGI on said premises. The adult plaintiffs did not consent to such examination by Defendant SURGI nor authorize her reference to confidential records made by THE STATE DEPARTMENT and SURGI in the course of adoption of the minor plaintiffs PAUL and SHAWANA by the adult plaintiffs. In fact and instead, adult plaintiffs requested and urged examination of the minor plaintiffs by a physician of their choice and were refused by THE STATE DEPARTMENT. After examination by Defendant SURGI, all three minor plaintiffs were placed in foster homes of THE STATE

DEPARTMENT in locations not disclosed to the adult plaintiffs.

5) On March 26, 1976, shortly before 5:00 P.M. and some 30 hours after seizure of the minor plaintiffs, an agent and employee of THE STATE DEPARTMENT filed a Suit For Protection Of Child In Emergency in the Court of Defendant LOWRY, containing a sworn affidavit alleging abuse of all three minor plaintiffs by the adult plaintiffs, in support of which there was attached the reports and drawings made by Defendant SURGI in the course of her examinations on March 25, 1976. On the face of such reports and drawings the Defendant SURGI makes reference to prior and confidential records of the minor plaintiffs PAUL and SHAWANA made during the course of their adoption by the adult plaintiffs through THE STATE DEPARTMENT. On the face of such report of Defendant SURGI inference of incest and/or sexual abuse is made with respect to the natural child of the adult plaintiffs, SABRINA, after pelvic and vaginal examination by Defendant SURGI.

6) At about 5:00 P. M. on March 26, 1976, the suit described in the foregoing Paragraph V(5) brought by THE STATE DEPARTMENT under color of Chapter 17, Title 2, Texas Family Code, based upon information obtained under color of Chapter 34, Title 2, Texas Family Code was delivered to Defendant LOWRY. Under color of provisions of Chapter 17, Title 2, Texas Family Code, Defendant LOWRY entered ex parte Orders by the terms of which Defendant LEGE was awarded physical possession, custody and control of the three minor plaintiffs for a ten-day period. Defendant LOWRY did not require that the minor plaintiffs be brought before him, conducted no hearing, and did not appoint counsel for said minors.

7) On March 30, 1976, the adult plaintiffs learned that the minor plaintiff PAUL had been hospitalized on

account of alleged abuse by the adult plaintiffs and went to the hospital to see their minor son. During the course of such hospital visit on March 30, 1976, the adult plaintiffs learned for the first time that the minor plaintiff PAUL had been paddled by Defendant RHEA on March 25, 1976, prior to the time he was paddled by his father in the presence of Defendant RHEA. Adult plaintiffs further learned that the prior paddling by Defendant RHEA on March 25, 1976, had been administered in the presence of Defendant ESTES.

8) On March 31, 1976, adult plaintiffs filed and attempted to set for hearing in the Court of Defendant LOWRY their application to modify the ex parte Orders entered on March 26, 1976; were advised that Defendant LOWRY would not be sitting on Friday, April 2, 1976, the earliest date such application could be heard after giving required statutory notice to THE STATE DEPARTMENT; and were further advised that no other Harris County Juvenile Judge would be available to hear such application. Said application was returned to counsel for adult plaintiffs after being file marked by the Clerk of said Court and has now been admitted into evidence in this cause.

9) Having been refused hearing on the foregoing application, adult plaintiffs then filed in the Court of Defendant LOWRY their application for Writ Of Habeas Corpus and same was set for hearing on April 5, 1976. No hearing was had by Defendant LOWRY on adult plaintiffs' application for Writ Of Habeas Corpus, although adult plaintiffs urged for hearing on April 5, 1976, and caused subpoenas to be issued for attendance of witnesses at such hearing. Instead, on April 6, 1976, Defendant LOWRY transferred such application to the Court of Defendant COKER.

10) At the time on April 5, 1976, that adult plaintiffs were urging hearing on said Writ, counsel for adult plaintiffs made known to Defendant LOWRY and to

agents and employees of THE STATE DEPARTMENT that all the Plaintiffs were residents of Montgomery County, Texas, and such County was the proper venue and situs for any further action regarding the minor plaintiffs under color of provisions of Title 2, Texas Family Code.

Despite such knowledge and shortly before 5:00 P.M. on April 5, 1976, agents and employees of THE STATE DEPARTMENT filed a Suit Affecting The Parent-Child Relationship in the Court of Defendant LOWRY seeking termination of the parental rights of the adult plaintiffs with respect to all three of the minor plaintiffs under color of Chapters 11, 14 and 15, Title 2, Texas Family Code, using information obtained under color of provisions of Chapters 34 and 17 of said Title 2.

Although Defendant LOWRY'S sole action under provisions of §11.071, Title 2, Texas Family Code was to dismiss such suit with prejudice, instead Defendant LOWRY again entered ex parte Orders whereby physical possession, custody and control of the three minor plaintiffs was continued in Defendant LEGE, and did so at a time when he had neither jurisdiction nor proper venue, as urged by counsel for the adult plaintiffs.

11) Still later and on April 6, 1976, Defendant LOWRY entered further ex parte Orders on his own motion whereby the suit filed by the THE STATE DEPARTMENT on April 5, 1976, and the Application For Writ Of Habeas Corpus filed by adult plaintiffs and set for hearing but not heard on April 5, 1976, both were transferred to the Court of Defendant COKER without hearing dates set for either.

12) Thereafter and on May 4, 1976, adult plaintiffs filed in the Court of Civil Appeals for the 14th District of Texas sitting at Houston their Application For Leave To File Writ Of Habeas Corpus to seek return to them of the

minor plaintiffs, which Application was denied for lack of jurisdiction, a copy of which denial has been admitted into evidence in this cause. Counsel for adult plaintiffs made repeated requests of THE STATE DEPARTMENT for a letter stating the minor plaintiffs were, in fact, in the custody of Defendant LEGE, but were unable to obtain same to attach to their Application.

13) Plaintiffs would particularly show unto this Court that from the date of seizure of the three minor plaintiffs by THE STATE DEPARTMENT on March 25, 1976 up to May 5, 1976, the date of first hearing before this United States District Court, no citation, process or notice of hearing was issued or served upon adult plaintiffs, nor were any of the plaintiffs afforded a hearing, either by Defendant LOWRY or Defendant COKER. The three minor plaintiffs remained in the physical possession, custody and control of Defendant LEGE for a period of 42 days. On May 5, 1976, this United States District Court afforded Plaintiffs first opporunity (sic) for hearing, found the minor plaintiffs to be illegally restrained by Defendant LEGE, and ordered their return to the adult plaintiffs.

14) Still later and on May 14, 1976, after this Court had ordered return of the minor plaintiffs to the adult plaintiffs and had further requested that a three-judge panel be convened to hear and adjudicate Plaintiffs' challenge to the constitutionality of state statutes, one Carol B. Jones, a Montgomery County agent and employee of THE STATE DEPARTMENT filed a new and second Suit Affecting The Parent-Child Relationship in the Court of Defendant COKER under color of Chapters 11, 14 and 15, Title 2, Texas Family Code, based upon prior information obtained by Harris County agents and employees of THE STATE DEPARTMENT under color of Chapters 34 and 17, Title 2, Texas Family Code. The identical drawing and report of Defendant SURGI made March 25, 1976,

regarding the minor plaintiff PAUL EDWARD SIMS is attached to said suit filed May 14, 1976, in the Court of Defendant COKER. Said suit bears the sworn affidavit of said Carol B. Jones that the facts and matters therein contained are true. Plaintiffs allege and state that Carol B. Jones has never seen the minor plaintiff PAUL EDWARD SIMS nor personally worked with minor or adult plaintiffs and acted only for purposes of harrassment (sic) of Plaintiffs on instructions from her superiors at THE STATE DEPARTMENT and was aided and abetted therein by employees and agents of THE STATE DEPARTMENT in Harris County, Texas for express purposes of harassment (sic) and intimidation of the adult plaintiffs who had sought forum in the United States Courts.

15) Based upon the suit filed May 14, 1976, by THE STATE DEPARTMENT acting by and through its agent and employee Carol B. Jones which was purportedly supported by findings of Defendant SURGI made some 50 days prior to the time of filing of such suit, Defendant COKER issued a Writ Of Attachment for the minor plaintiff, PAUL EDWARD SIMS, under color of Chapters 11 and 14, Title 2.

16) On May 26, 1976, this Court issued its Temporary Restraining Order restraining any further action in the State Courts of the State of Texas against any, either or all of the Plaintiffs under color of any provisions of Chapters 11, 14, 15, 17 and/or 34, Title 2, Texas Family Code, and ordered hearing before the three-judge panel upon Plaintiffs' application for a preliminary injunction to be effecting (sic) pending Plaintiffs' challenge to the constitutionality of such statutes.

VI.

Chapters 34, 17, 11, 14 and 15, Title 2, Texas Family Code, on their face and as interrelated and applied to Plaintiffs herein violate and are repugnant to the

Constitution of the United States, as follows:

1) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment to the United States Constitution in that the operation of the Statutes creates a chilling effect upon all the Plaintiffs in their exercise of freedom of speech, freedom of family association and unity, and right to petition for a redress of grievances.

2) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment because they are void for vagueness, capable of arbitrary and capricious standards of enforcement, contain no safeguards against deprivation of fundamental human rights on account of arbitrary and capricious enforcement, and sweep constitutionally protected rights within their scope and application.

3) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth Amendment of the United States Constitution in that operation of the Statutes invades their fundamental human rights to family unity and privacy and in addition, allow seizure of the three minor plaintiffs without probable cause or duly authorized warrant for such seizure.

4) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth, Fifth and Fourteenth Amendments in that they allow seizure of confidential information of Plaintiffs without providing safeguards for limitation of the use and dissemination of such information.

5) The Statutes on their face and as applied to all the Plaintiffs violate the Due Process Clause of the Fifth and Fourteenth Amendments in that they are void for vagueness and are uncertain, and give unconstitutional effect to acts, procedures, policies, practices and customs of governmental agencies of the State which

violate the procedural and substantive "due process rights" of Plaintiffs as additionally guaranteed by the Fifth and Sixth Amendments to the Constitution, should Plaintiffs fail or refuse to conform to and follow such State governmental agency guidelines.

6) The Statutes on their face and as applied to Plaintiffs violate the Fifth and Fourteenth Amendments in that they unconstitutionally delegate legislative and judicial authority to a State governmental agency and vest in such agency the power to make determinations which totally control and ultimately destroy fundamental human rights of the Plaintiffs to family unity and family privacy.

7) The Statutes on their face and as applied to Plaintiffs violate the self-incrimination clause of the Fifth Amendment by providing the basis for eliciting information and evidence which could later be used against Plaintiffs to terminate their parent-child relationship. In short, under color of law, and after seizure of their minor children, adult Plaintiffs have been coerced and intimidated by veiled promises of return of their children, in violation of their Fifth Amendment rights.

8) The Statutes of their face and as applied to adult Plaintiffs contemplate and encompass possible criminal prosecutions, yet on their face and as applied to adult Plaintiffs violated their Sixth Amendment rights to speedy and public trial, to be informed of the nature and cause of the accusations against them, and rights to be confronted with the witnesses against them.

9) The Statutes on their face and as applied to the three minor Plaintiffs not only violate their Sixth Amendment rights to a speedy hearing, but also their rights to counsel from the instant of seizure and removal from their family unit.

10) The Statutes on their face and as applied to all the Plaintiffs violate the Fifth and Fourteenth Amendments by depriving them of property without due process of law.

11) The Statutes on their face and as applied to Plaintiffs violate the First, Ninth and Tenth Amendments, in that they infringe upon the category of fundamental human rights reserved by law to individuals, free and unfettered by governmental regulation.

12) The Statutes of their face and as applied to the minor Plaintiffs violate Article I, Section 9, the Sixth and Fourteenth Amendments of the Constitution by suspending their right to the Writ Of Habeas Corpus and deprive them of their liberty without due process of law and their right to counsel while under seizure and without access to their family unit.

13) §§34.03 and 17.09, Title 2, Texas Family Code on their face and as applied to Plaintiffs violate the First and Fourteenth Amendments of the Constitution and the provisions of 42 U.S.C. §1983 in that they deprive Plaintiffs of redress for grievances for deprivation of constitutionally-guaranteed rights and insulate against accountability, liability and responsibility for such deprivations on the part of those persons who have subjected or caused Plaintiffs to be subjected to deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

14) §§34.06 and 34.08, Title 2, Texas Family Code on their face and as applied to Plaintiffs violate the Due Process Clause of the Fifth and Fourteenth Amendments in that they unconstitutionally delegate legislative and judicial authority to a governmental agency to determine what constitutes child abuse, to chronicle such determinations in a central registry and

on to a national registry, to cloak such information with confidentiality without limitation on use and dissemination thereof other than according to rules and regulations to be adopted by the very agency to which such legislative and judicial authority is delegated, leaving within the sole discretion of such governmental agency the right to arbitrarily and capriciously set standards without guarantees or safeguards for the protection of substantive and procedural rights of due process.

VII.

All of the Plaintiffs allege and state that each of the Defendants, under color of law of the State of Texas, subjected or caused all the Plaintiffs to be subjected to deprivation of their rights, privileges and immunities secured to them by the Constitution and laws of the United States. As a proximate result of such illegal actions on the part of Defendants, Plaintiffs have and will continue to suffer mental anguish, humiliation, embarrassment, damage to reputation in the communities where they reside, are employed and/or attend school, deprivation of property, and irreparable injury, damage and harm to their family unity and privacy, for which they each here seek redress from Defendants in damages.

VIII.

Plaintiffs have reason to believe and do believe that THE STATE DEPARTMENT may have included their names in a Central Registry provided for by the state statutes herein challenged; and further, that their names may have been transmitted by THE STATE DEPARTMENT to other such registries under provisions of such statutes.

Plaintiffs herein pray the Court to require full disclosure by THE STATE DEPARTMENT of any

information of any nature concerning all the Plaintiffs placed in such Central Registry and transmitted to any other registries; to require that any such information be expunged therefrom in any places where it may have been placed or disseminated by THE STATE DEPARTMENT, in order that further and future irreparable injury, damage and harm to the reputation, employment and/or academic records and status of Plaintiffs on account thereof. Plaintiffs further pray the Court permanently to enjoin THE STATE DEPARTMENT from placing any information of whatsoever nature with respect to any of the Plaintiffs in any such registry pending adjudication of Plaintiffs' constutional (sic) challenge to such state statutes.

IX.

WHEREFORE, Plaintiffs pray that the Court will with all expediency take all steps necessary to convene a three-judge panel, hear this action at the earliest practicable date, advance this case on the docket, cause this case in every way to be expedited and heard, and upon such hearing, pray the Court to:

1) Issue a declaratory judgment declaring that Title 2, Texas Family Code, Chapters 11, 14, 15, 17 and 34 are violative of the Constitution of the United States, are null and void on their face and as applied to Plaintiffs.

2) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from impeding, abridging, intimidating, chilling, hindering, preventing, threatenting, deterring, discouraging and otherwise interfering with Plaintiffs in their exercise of the rights, privileges and immunities guaranteed to them by the Constitution of the United States; and,

3) Permanently enjoin and restrain the Defendants,

their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction from use, operation, enforcement, execution and application of Title 2, Texas Family Code, Chapters 11, 14, 15, 17 and 34, and from implementing and/or adopting rules, regulations and policies pursuant thereto; and,

4) Grant Plaintiffs punitive damages because the above-described acts and conduct of the Defendants were and are in reckless, wilful (sic) and wanton disregard of the rights and welfare of the citizens whom Defendants have an obligation to protect.

5) Grant Plaintiffs their actual damages proximately resulting from the actions of Defendants described above, which actions and conduct resulted in Plaintiffs' injury.

6) Awared (sic) to the undersigned attorneys for Plaintiffs judgment against Defendants for reasonable attorney fees for services rendered herein; and,

7) Allow Plaintiffs to recover from Defendants their costs herein, and award to Plaintiffs such other relief as appears to the Court necessary, equitable or just herein.

ARTICLE 5

FIRST AMENDED ANSWER

ARTICLE 5, FIRST AMENDED ANSWER

Now come defendants Raul Jimenez, Jamie Clements and Hilmar G. Moore, individually and as Chairman and Members, respectively, of the Texas State Board of Public Welfare; Raymond Vowell, individually and as Commissioner of the Texas State Department of Public Welfare; Gene Lege, individually and as Director of the Harris County Child Welfare Unit of the Texas State Department of Public Welfare; Marian Lockley, individually and as Head Program Director of the Montgomery County Welfare Unit of the Texas State Department of Public Welfare; and Marie L. Surgi, by and through John L. Hill, Attorney General of Texas, and make this their First Amended Answer to plaintiffs' First Amended Complaint.

1. The allegations contained in Part I are admitted only insofar as they seek to state the nature of the case brought by plaintiffs, but otherwise they are denied.

2. The allegations contained in Part II are admitted only insofar as they state the propriety of a three judge court to determine this matter, but otherwise they are denied.

3. The allegations contained in Part III are admitted except insofar as paragraph 5 thereof alleges that the minor plaintiffs were illegally restrained in which respect the allegations are denied.

4. The allegations contained in Part IV are admitted except that Garrett Morris is no longer a member of the Texas State Board of Public Welfare, but rather Jamie Clements is a member of said Board.

5. The allegations contained in Part V are admitted or denied as follows:

(a) The allegations contained in paragraph 1 are admitted;

(b) The allegations contained in paragraph 2 are denied;

(c) The allegations contained in paragraph 3 are denied;

(d) The allegations contained in paragraph 4 are denied;

(e) The allegations contained in paragraph 5 are denied;

(f) The allegations contained in paragraph 6 are admitted;

(g) The allegations contained in paragraph 7 are denied;

(h) The allegations contained in paragraph 8 are denied;

(i) The allegations contained in paragraph 9 are denied;

(j) The allegations contained in paragraph 10 are denied;

(k) The allegations contained in paragraph 11 are denied;

(l) The allegations contained in paragraph 12 are denied;

(m) The allegations contained in paragraph 13 are denied;

(n) The allegations contained in paragraph 14 are denied;

(o)The allegations contained in paragraph 15 are admitted;

(p) The allegations contained in paragraph 16 are admitted.

6. The allegations contained in Part VI are denied.

7. The allegations contained in Part VII are denied.

Wherefore, defendants pray that the Court deny all relief requested by the plaintiffs and grant the defendants any further relief to which they may show themselves entitled, including recovery of costs.

ARTICLE 6

MOTION PURSUANT TO RULE 17(c)

ARTICLE 6,
MOTION PURSUANT TO RULE 17(c),
FEDERAL RULES OF CIVIL PROCEDURE

Now comes the State Department of Public Welfare, defendant herein, and moves the Court to enter an order for the protection of the minor children of John Pleasant Sims, and wife, Mary Carter Sims, i.e., Sabrina Marie Sims, Paul Edward Sims, and Shawana Evette Sims, pursuant to Rule 17 (c) of the Federal Rules of Civil Procedure, and in support thereof would show as follows:

(1) That this case arose because the Harris County Child Welfare Unit sought to protect the children in question from abuse by the very parents who have brought this action as "next friend".

(2) That such action was only brought after physical evidence, based upon a medical examination, revealed that the minor male, Paul Sims, was found to have severe bruises all over his body (as shown by the diagram attached to pleadings introduced into evidence herein by the plaintiffs) and ulcerated skin oozing blood. The medical examination further revealed hematomas in each buttock as big as tennis balls. The minor females,Sabrina and Shawana Sims, were shown to have bruises on their backs, buttocks, and thighs.

(3) That the action herein occurred after a beating inflicted upon Paul Sims by his father, John P. Sims.

(4) That the sole object of removal of the children from the home was, according to the pleadings, filed in a State court, to afford an opportunity for investigation and to afford the parents an opportunity to attend counseling prior to return of the children to the home.

(5) That no suit to terminate the parent child relationship under Chapter 15 of the Family Code (15.01 through 15.07) was ever filed by the child welfare workers in either Harris or Montgomery County.

(6) That the parents of these children are still in need of counseling from a competent psychiatrist, psychologist, or social worker expert in the field of counseling.

(7) That a conflict of interest may exist herein between the interests of the parents and the children in that the very issue at stake herein concerns the right of the State to intervene in order to protect the children from danger to their health and physical safety and to protect the best interests of the children as contrasted with the interests of the parents.

(8) That the parents herein, John Pleasant Sims and Mary Carter Sims, ceased to use the counseling services of Blair and Rita Justice, Counselors with the University of Texas School of Public Health, with whom they had been conferring during the period of separation of children herein from their home, or any other counselors as soon as they obtained the original temporary restraining order from this Court requiring the children to be returned to the custody and control of the parents.

(9) That the parents would benefit from further counseling with a competent psychiatrist, psychologist or social worker concerning the relationship with said children and in particular with regard to the physical punishment and abuse of said children.

Wherefore, the State Department of Public Welfare prays that an order be issued pursuant to Rule 17(c): (1) appointing a guardian ad litem who shall act as the representative of the minor children,Paul Sims, Sabrina Sims and Shawana Sims, with authority to control and direct litigation, determine what the rights of said minor children are in this matter and what is

demanded to protect their interests, including engaging counsel and filing pleadings herein on their behalf; (2) requiring that the parents of Sabrina Marie Sims, Paul Edward Sims, and Shawana Evette Sims, engage in counseling with a competent psychiatrist, psychologist, or social worker, competent in the field of counseling, or continue their counseling relationship with Blair and Rita Justice, Counselors with the University of Texas School of Public Health, pending the outcome of this litigation.

ARTICLE 7

MOTION TO DISMISS

ARTICLE 7, MOTION TO DISMISS

Now come the State Department of Public Welfare, and defendants herein, and move the Court, pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss this cause of action for failure of the plaintiff to state a claim upon which relief may be granted, and in support thereof would show as follows:

1. This Court is barred from intervening in the proceedings of the juvenile court of Montgomery County, Texas, under the principles enunciated in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975).

2. This Court should allow the courts of the State of Texas to interpret the meaning of the Texas Family Code and the constitutionality of its provisions, which still allow for final review, if necessary, by the Supreme Court of the United States.

3. The principles of comity and federalism should be applied to preclude the intervention by this Court in a matter which may be fully adjudicated by the State courts, subject to review by the United States Supreme Court.

Wherefore, the State Department of Public Welfare, defendant herein, prays that the temporary injunction issued herein be dissolved and that this action be dismissed for failure to state a claim upon which relief may be granted.

ARTICLE 8

ORDER, DENIAL OF MOTION TO DISMISS

ARTICLE 8, ORDER

Defendant, State Department of Public Welfare, having filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b) (6), and the court having considered same, the court finds that the motion should be denied. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Furthermore, contrary to defendant's contention, plaintiffs' cause of action is not of the nature which would require this court to refrain from interference in state court proceedings.

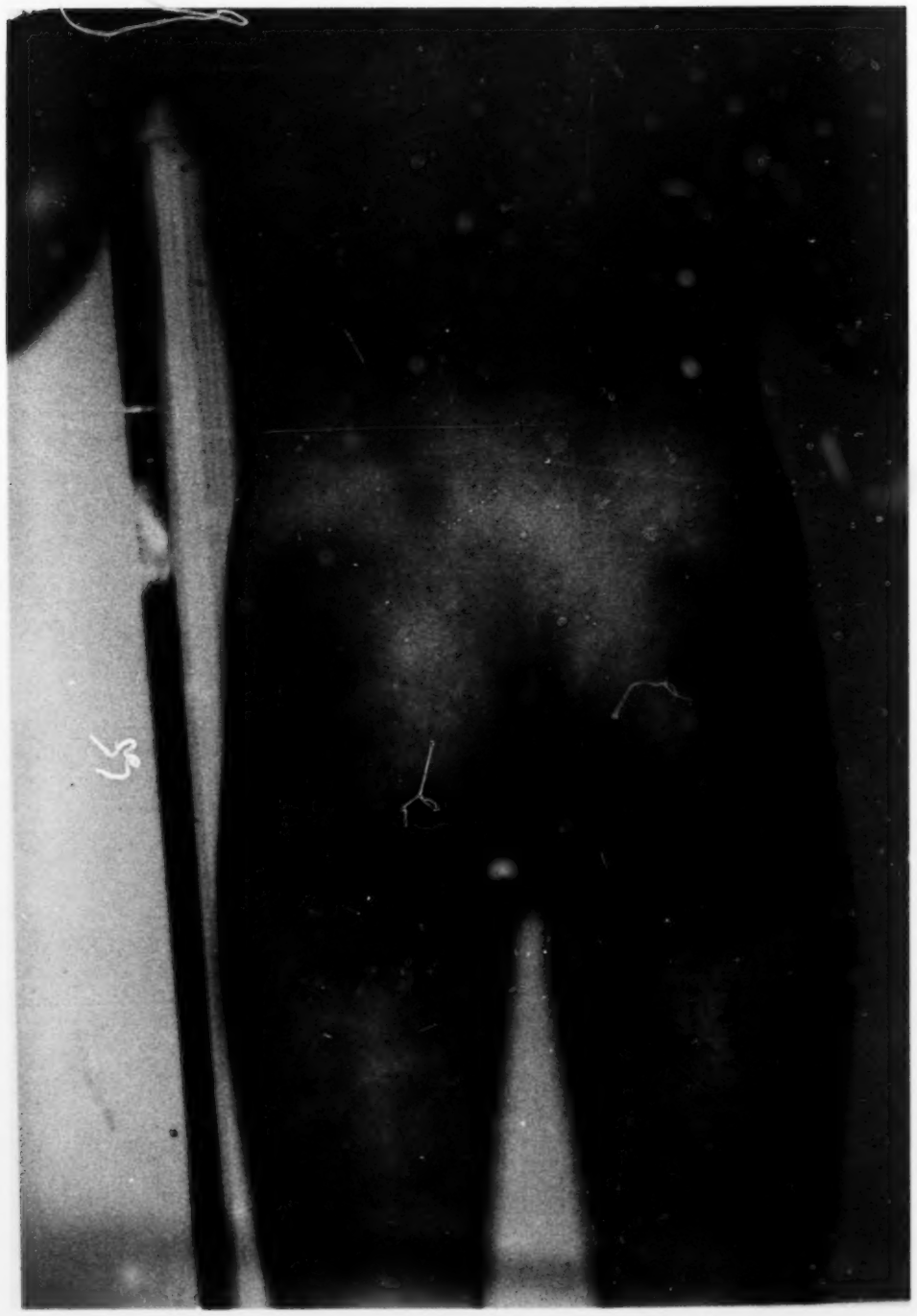
Accordingly, the State Department of Public Welfare's motion to dismiss the above-styled-and-numbered cause is hereby DENIED.

DONE at Houston, Texas, on this 13th day of October, 1976.

ARTICLE 9

DEFENDANTS' EXHIBITS 6 AND 7

ARTICLE 9, DEFENDANTS' EXHIBIT 6



DEFENDANTS' EXHIBIT 7

ARTICLE 10

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTHOUSE

HOUSTON, TEXAS 77002

CHAMBERS OF
JUDGE JOHN V. SINGLETON, JR.

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Mesdames and Gentlemen:

In re: C. A. 76-H-665
John Pleasant Sims, et al.
v. State Department of
Public Welfare, et al.

The court directs counsel for plaintiffs to prepare an appropriate final judgment consistent with the conclusions of this court as reflected in the attached memorandum opinion and to submit such judgment to the attorney general for approval as to form.

Very truly yours,

s/s
John V. Singleton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-665
STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS, ET AL., Defendants.	)(	
DOROTHY MAE WOODS, ET AL., Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-1120
RAUL JIMENEZ, ET AL., Defendants.	)(	

Before INGRAHAM, Circuit Judge, and
SINGLETON and STERLING, District Judges.
SINGLETON, District Judge:

This civil action is challenge to the constitutionality of portions of Chapters 11, 14, 15, 17, and 34, Title 2, TEXAS FAMILY CODE, seeking declaratory, injunctivonetary relief. The plaintiffs in the *Sims* case are two adult parents and their three minor children who seek relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare. Additionally, the case of *Woods v. Jimenez*,

Civil Action No. 76-H-1120, pending in this district, was consolidated with the *Sims* case solely on the issue of the right of indigent parents to counsel in suits for the termination of the parent-child relationship.

Pursuant to 28 U.S.C. §§ 2281, 2284, a three-judge district court was convened to determine the constitutional issues. The court has carefully considered the extensive briefs, the arguments of counsel, and the evidence presented and concludes that the case is properly before the court for determination, that certain portions of the Texas Family Code are violative of minimal constitutional standards, and that appropriate declaratory and injunctive relief is necessary.

The threshold issue is that of abstention in light of *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, ___ U.S. ___, 51 L.Ed.2d 376 (1977), and *Trainor v. Hernandez*, ___ U.S. ___, 52 L.Ed.2d 486 (1977). Having viewed the instant case with an eye to the notions of comity and federalism which underlie *Younger's* policy of equitable restraint, this court concludes that abstention is not warranted and would be improper under the unique and compelling circumstances of this case.

A chronology of the events which precipitated the filing of this suit is necessary. In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas. On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. In response to that call, caseworker Rex Downing visited the school and, on the same date, took possession of the three Sims children

pursuant to Section 17.01 of Title 2 of the TEXAS FAMILY CODE.[1] The next day, March 26, the Child Welfare Unit instituted a "Suit for the Protection of a Child in an Emergency" pursuant to Chapter 17, which was filed in Juvenile Court Number One of Harris County, Texas, Cause No. 38,295, and concerned all three of the Sims children. Also on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court issued an ex parte order pursuant to Section 17.04, which has the effect of removing the children from the custody of their parents. Section 17.05 provides that such an order is of ten days in duration, and, upon the expiration of the order, the court is required to either order the restoration of the children to their parents or direct that a "Suit Affecting the Parent-Child Relationship" be filed.

On March 31, 1976, the plaintiff-parents sought to present to Judge Lowry a motion for modification of the March 26 Order, pursuant to Section 17.06. Although that section requires that a hearing be held on the motion, no hearing was in fact held. Rather, evidence before this court on May 5, 1976, indicates that the motion was not presented to Judge Lowry because of his temporary absence and was returned to counsel for the parents. Later on March 31, 1976, counsel for the parents filed with the Juvenile Court Number One, a petition for a writ of habeas corpus, Cause No. 1,069,341.

On April 5, 1976, a hearing was held before Judge Lowry on the parents' petition for a writ of habeas corpus. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. However, the merits of the dispute were never addressed. At the April 5 hearing, Judge Lowry determined that the children were residents of Montgomery County and, despite their

custody in Harris County, transferred the matter to Montgomery County. Later on April 5, at Judge Lowry's direction pursuant to Section 17.05(B) (2), the Harris County Child Welfare Unit filed a "Suit Affecting the Parent-Child Relationship" in *Harris* County. This second petition by the current defendants was filed in the same Cause No. 38,295 as the original emergency suit filed under Chapter 17. Finally, on April 5, 1976, Judge Lowry issued another ex parte temporary order pursuant to Section 11.11.[2] The order directed that the children continue in the possession of the Harris County Child Welfare Unit and purported to set a hearing upon its expiration. However, the order setting the hearing was entered in blank and to date the blanks have never been completed.

On April 6, 1976, the "Suit Affecting the Parent-Child Relationship" (Cause No. 38,295), which supplanted the emergency suit, and the habeas corpus action (Cause No. 1,069,341) were officially transferred to the District Court of Montgomery County and assigned to the docket of Judge Ernest A Coker, Sr. The transfer was apparently made *sua sponte* under Section 11.06(a) despite the requirement that it be transferred upon a timely motion.[3] It is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County. During the entire time, the children remained in the custody of the Harris County Child Welfare Unit.

On April 19, 1976, the plaintiffs filed their Original Complaint in federal court. On May 4, 1976, the plaintiffs filed a motion for leave to file an original petition for a writ of habeas corpus with the Texas Court

of Civil Appeals for the 14th District, which was denied on the same date. The next day, the managing judge of the three-judge district court conducted an evidentiary hearing at which the court found that the children were not in the legal custody of the defendants because the ex parte temporary order under Chapter 17, dated March 26, and the ex parte order under Section 11.11, dated April 5, had both expired. The court ordered that the Sims children be returned to their parents, but did not enjoin the Department of Public Welfare from taking action under state law to properly establish a temporary conservatorship over the children. Therefore, on May 14, 1976, the Department of Public Welfare filed another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County. This action concerned Paul Sims only.

The Juvenile Court on May 14, 1976, established a temporary managing conservatorship for the child and set a hearing for May 21. On May 21, upon the motion of the plaintiffs, the managing judge of the three-judge panel temporarily enjoined the hearing in Montgomery County. Subsequently, after a hearing, the three-judge court extended the restraining order and enjoined any further state proceeding under the challenged statutes pending determination of the plaintiffs' constitutional challenges.

I. ABSTENTION ISSUE

As a preliminary matter, the parties are in dispute as to whether there is a pending state action. Although the Chapter 15 action filed on May 14, 1976, was obviously not pending on the date the federal action was instituted, the original "Suit Affecting the Parent-Child Relationship" which was filed on April 5, 1976, and transferred to Montgomery County from Harris County on April 6 was pending on April 19 and, along with the action filed on May 14, remains on the docket of the

District Court of Montgomery County. The plaintiffs' argument that there is no pending proceeding because the temporary orders have expired is therefore without merit. *See Steffel v. Thompson*, 415 U.S. 452 (1974); *Hicks v. Miranda*, 442 U.S. 332 (1975). Although, as we note *infra*, there is no pending state judicial proceeding with regard to some aspects of the plaintiffs complaint, abstention must still be addressed because of the proceeding filed on April 5, 1976.

The extent to which *Younger* principles apply to a case where the pending state action is civil in nature is still unclear. The first acknowledged extension of *Younger* to civil cases involved a nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, LTD., supra* at 604. However, more recently, in *Juidice v. Vail*, ___U.S.___, 51 L.Ed.2d 376 (1977), and in *Trainor v. Hernandez*, ___U.S.___, 52 L.Ed.2d 486 (1977), the Supreme Court extended the coverage of *Younger* to an even broader range of civil cases. In each of the two most recent decisions, the court has reserved the issue of whether *Younger* principles apply to all civil cases. We believe that the facts of the instant case do not require abstention and, moreover, the nature of the constitutional challenge lodged against the questioned statutory scheme presents a compelling reason for this court to serve as the "primary and powerful" source for vindication of federally protected constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).

In *Huffman* the Court emphasized that the fact that the state's criminal process was not involved was not determinative. Rather, a federal court considering an injunction against a pending state proceeding must carefully weigh the notions of comity and federalism and allow the state to effectuate its own policies through "a forum competent to vindicate any constitutional

objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. at 604 (1975). The plaintiff in *Huffman* sought an injunction against the execution of a judgment entered in a pending nuisance action brought by the State of Ohio. Because such a federal injunction would disrupt "that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws," abstention was required. 420 U.S. at 605. The Court, therefore, extended the *Younger* policies of nonintervention to civil cases where the Court could find that a federal injunction would be "an offense to the State's interest... every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. It was at this early stage of the evolution of *Younger* to civil cases, that this court issued its preliminary injunction on June 18, 1976.

Since *Huffman*, this court has received the Supreme Court's guidance in *Juidice* and in *Trainor*, both expanding the original narrow application to civil cases in a manner requiring this court to carefully reflect on its judicial responsibilities with respect to the vindication of these plaintiffs' constitutional rights.

In *Judice v. Vail, supra*, *Younger* principles were held to prevent a federal court from enjoining a state judicial contempt proceeding on the basis of the weight to be given "a State's interest in contempt proceeding, through which it vindicates the regular operation of its judicial system." ___ U.S. at ___, 51 L.Ed.2d at 384. Acknowledging that such an interest is perhaps "not quite as important as is the State's interest in the enforcement of its criminal laws, . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*," the Court labeled the interest in contempt proceedings as "of sufficiently great import." ___ U.S. at ___ 51 L.Ed.2d at 384. In

finding that "the contempt power lies at the core of the administration of a State's judicial system," ___ U.S. at ___, 51 L.Ed.2d at 384, the Court continued to concern itself with a pending state action which, like a criminal prosecution or nuisance proceeding, was unique to the governmental role of a state.

In *Trainor v. Hernandez, supra*, the Court appears to have expanded the types of state civil proceedings requiring the application of *Younger* principles. In *Trainor* the State of Illinois brought a civil action against the appellees seeking a return of welfare payments alleged to have been wrongfully received and sought a writ of attachment. The three-judge court enjoined the attachment and declared the Illinois Attachment Act to be unconstitutional. In remanding to the lower court for consideration of whether the attachment statute provides a debtor with a proper forum for his constitutional challenge, the Supreme Court noted that the principles of *Younger* and *Huffman* apply to injunctions against actions "brought by the State in its sovereign capacity," ___ U.S., ___, 52 L.Ed.2d at 496, rejecting the argument that attchement was not a remedy unique to the state and emphasizing, instead, that the state was a party to the attachment in its underlying role of administering public assistance programs. The Court concluded that a federal injunction's "disruption of suits by the State in its sovereign capacity, when combined with a negative reflection on the State's ability to adjudicate federal claims" dictated abstention unless "extraordinary circumstances were present." ___ U.S. at ___, 52 L.Ed.2d at 497.

It is in this legal and factual setting that this court decides that *Younger* and its progeny do not require application of their principles to the current dispute between these plaintiffs and the State of Texas.

Although *Juidice* and *Trainor* have expanded the types of civil cases to which *Younger* extends, it is clear that neither decision purports to apply *Younger* principles to all civil litigation between a state and its citizens. *Juidice*, ___U.S. at___, 51 L.Ed.2d 385 n. 13 (1977); *Trainor*, ___U.S. at ___, 52 L.Ed.2d at 496 n.8 (1977). From this we conclude that because of the wide range of interests and circumstances that could conceivably be present in a civil dispute, the proper role of a federal court is to carefully analyze each dispute individually with an equitable view toward the principles of comity and federalism and a careful study of the state action involved.[4] This court considers the *Younger* principles inapplicable here for two reasons: the nature of the state action and the nature of the plaintiff's challenge.

First, the action taken by the State of Texas against the plaintiffs is multifaceted. Unlike a criminal prosecution, or a nuisance, contempt, or attachment proceeding, there is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds. Many of the challenged actions taken by the state do not and will not involve any judicial proceeding.[5] Certainly as to these, there is no pending state civil litigation about which even to consider abstention. The only pending state suit is the one pending in Montgomery County, filed on April 5, 1976. Because the dispute between the plaintiffs and the State of Texas concerns more than a single state judicial action to which plaintiffs could raise a constitutional defense, *Younger* principles are inapplicable. *See Younger*, 401 U.S. at 46 (1971). The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This court will not consider part of the scheme and abstain from another part. To do so would seriously jeopardize any hope for an

effective statutory scheme and, in the name of comity and federalism, do violence to the state functions those principles seek to protect.

As a second independent basis for the inapplicability of *Younger* principles, we note that the plaintiffs' constitutional challenge is directed primiarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, adstention would be inappropriate. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975). The denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger*. *Cf. Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974).

Even if the nature of the state action and the constitutional challenge were such as to require the application of *Younger* principles, it is clear that there exists here circumstances where, even though the principles are otherwise applicable, a federal court should not abstain. Certainly, the threatened injury to the plaintiffs is both great and immediate. As we note *infra* the constitutional issues raised by the plaintiffs reach the application of due process in an area of the greatest importance to our society, the family. The constitutional infirmities recognized by this court, if uncorrected, would cause an injury to these plaintiffs far greater than a deprivation of a mere property interest. Furthermore, it has been recognized that where, as here, the plaintiff may not raise all of his constitutional claims as a defense in a *single* state proceeding, the necessary irreparability is present. *Younger v. Harris*, 401 U.S. at 46 (1971). When reviewing a statute permitting the North Carolina

authorities to take custody of children without a hearing under certain circumstances, the court in *Newton v. Burgin, supra*, observed that "the deprivation of custody prior to the civil proceeding is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the state proceeding."

Of course, we realize that the mere facial invalidity of a statute does not in itself justify federal interference. *Younger v. Harris*, 401 U.S. at 54 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. at 602 (1975). While it is clear that intervention is warranted where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *Watson v. Buck*, 313 U.S. 387, 402 (1941), such a finding is not the only justification for federal action. In *Younger* the Court explained:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the Buch case, supra, we indicated:
>
> > It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 313 U.S. at 402.
>
> Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be.

401 U.S. at 53-54.

In addition to this court's finding, *infra*, that several sections of the TEXAS FAMILY CODE are "flagrantly and patently" violative of federal constitutional requirements, the "unusual" circumstances referred to in *Younger* are present here and compel this court to grant equitable relief. Recognizing that more than a "highly unusual factual situation" must be present, *Trainor v. Hernandez*, ___ U.S. at ___, 52 L.Ed.2d at 494-95 n. 7 (1977), we find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply.

As a general expression of the extraordinary and compelling circumstances present here, this court finds an absence for these plaintiffs of "an opportunity to fairly pursue their constitutional claims in an ongoing state proceeding." *Juidice*, ___ U.S. at ___, 51 L.Ed.2d at 396 (1977) citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).[6] Unlike the plaintiff in *Juidice*, the *Sims* plaintiffs have not failed to avail themselves of any opportunities in the state procedures. Despite serious constitutional objections to its burden-of-proof requirement, the plaintiffs sought a modification of the original ex parte order pursuant to Section 17.06. Although mandated by the statute, no hearing was afforded them. Plaintiffs also sought to raise their objections in an application for a writ of habeas corpus, but, when they were prepared to seize this opportunity to be heard, the matter was transferred to Montgomery County, and, despite the parents' presence in court earlier that day, the court issued another ex parte custody order and set a hearing in Montgomery County for an uncertain time in the future. Certainly, such efforts to earn an opportunity to be heard are more than sufficient before seeking relief in federal court on April 19, 1976.

The plaintiffs' having sought through diligent efforts an opportunity to be heard in a state proceeding, this court must conclude that whatever opportunities exist for them are not such as to allow them to "fairly pursue" their constitutional objections. In reaching such a conclusion, we are mindful that "[t]he policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), quoted in *Trainor*, ___ U.S. at ___, 52 L.Ed.2d at 494 (1977). Analogized to a civil dispute, no such premise can be found here. This court has already chronicled the attempts by the plaintiffs to receive any hearing in state court. The plaintiff-parents were separated from their children for a period of 42 days without a hearing--a period ended only by an order of this court. The burdensome irregularities encountered by these plaintiffs in seeking a state forum for their constitutional claims illustrate to this court that in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues. Under such circumstances, abstention would be inappropriate. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1325 (1977).

In addition to the apparent procedural futility of requiring the plaintiffs to proceed with the pending suit, the statutory scheme on its face fares no better. The very nature of the constitutional challenge here is to the fairness of the state procedure. Such being the case, especially when compounded by the irregularities present here, it "plainly appears" that the state forum would not offer these plaintiffs adequate protection in their challenge to the state procedures, even assuming all matters could be raised in a defense to the pending "Suit Affecting the Parent-Child Relationship." *Gibson v. Berryhill*, 411 U.S. 464, 469 (1973).

Therefore, because of the failure of the state to follow its procedures and because of the futile efforts of the plaintiffs to seek relief in the state system,[7] this court finds that there is for these plaintiffs no "opportunity to fairly pursue their constitutional claims in an ongoing state proceeding."

Accordingly, this court holds that abstention is not required because *Younger* principles do not apply to this dispute between the plaintiffs and the State of Texas and, even if such principles do apply, there exist extraordinary circumstances which compel this court to provide a federal forum for the vindication of these plaintiffs' constitutional rights. Having so decided, we must address the merits of the plaintiffs' case.

II. MERITS

At the outset it must be noted that there is no dispute between the parties as to the gravity of child abuse and the compelling state interest in quickly and effectively removing the victims of child abuse from their parents. Similarly, the parties agree that where real, immediate, and irreparable physical harm is likely, the state has an interest in taking so-called "emergency" possession of the children. The gravamen of the plaintiffs' complaint is that in effectuating the legitimate state interest, the TEXAS FAMILY CODE does so in a manner which contravenes basic constitutional principles. They have mounted a broad-based challenge to Chapters 11, 14, 15, 17, and 34 of Title 2, TEXAS FAMILY CODE.

This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent. Briefly, the procedure under surveillance here begins with Chapter 34, which is concerned with the reporting of suspected child abuse and the initial investigative steps by the State Department of Public Welfare. Once suspected abuse is

identified under Chapter 34, Chapter 17 enables the State to take possession of the victims for the "Protection of [a] Child in [an] Emergency."[8] By the terms of Section 17.05(b)(2), the state may then institute a "Suit Affecting the Parent-Child Relationship." This term of art is defined in Section 11.01(5) as

> "a suit . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought."

Such a suit, therefore, refers both to a Chapter 14 proceeding, in which the appointment of a conservator is sought, and to a Chapter 15 proceeding, which is entitled "Termination of the Parent-Child Relationship."

In the suit filed by these defendants at the direction of Judge Lowry, pending in Montgomery County, only Chapter 14 relief was being sought at the time the court issued the preliminary injunction. Consequently, the defendants have questioned the standing of the Sims parents to challenge the constitutionality of any part of Chapter 15. This court finds, however, that the spectre of a Chapter 15 suit involving the Sims family is sufficient to confer standing. *See O'Shea v. Littleton*, 414 U.S. 488 (1974); *Massachusetts v. Mellon*, 262 U.S 447 (1923). The caseworker assigned to investigate the Sims family, Rex Downing, testified in his deposition that he would seek permanent termination of the parent-child relationship as part of the Montgomery County action, which is entitled broadly "Suit Affecting the Parent-Child Relationship."

It is now clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted

intrusions by the state. The Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) commented:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted.]

405 U.S. at 651. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *May v. Anderson*, 345 U.S. 528 (1953); *Griswold v. Connecticut*, 381 U.S 749 (1965); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Alsager v. Disrict Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976). Having emphasized the importance of such a right, courts are required to carefully scrutinize any attempt by a state to intrude upon it. It is axiomatic that where due process must be afforded, the courts must still decide what process is due. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). In making such an analysis, the competing interests must be identified and weighed. There are three: the liberty and privacy interest afforded to the parents, the interest of the state, as *parens patriae*, in protecting children from harm and, finally, the often silent interest of the child.

Reporting Child Abuse. Chapter 34 of Title 2, TEXAS FAMILY CODE is directed at the preliminary investigative powers of the state before any judicial relief is sought. Although recognizing the need to encourage the reporting and investigation of suspected cases of child abuse or neglect, we find that three aspects of Chapter 34 violate minimal constitutional guarantees. First, to the extent that a court order under § 34.05(c)[9] may be obtained without notice to the parents and upon any showing less than that the relief sought is necessary to aid in the determination of the existence of any abuse, it violates due process by permitting an unbridled invasion of the family unit. There is little doubt that the mandate of due process extends to an investigative stage of state action. Psychological or psychiatric examinations represent such an intrusion into the privacy of the family that, if objected to, should not be ordered without some type of adversary hearing before a judicial body. The state's interest in the protection of the child is not endangered by the requirement of such notice because of the existence, under unusual circumstances, of the course of action available under § 34.05(d).[10]

A second constitutional defect in the system of reporting child abuse appears in Section 34.08, which provides:

> The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Despite assurances from the state that the investigation permitted by Chapter 34 is "nonaccusatory," it is undisputed that the information

gathered pursuant to that chapter is used as a basis for further action by the state under Chapters 17, 14, or 15.

Although some intrusion into a family unit is permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports[11] and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Finally, with regard to Chapter 34, this court finds that Section 34.06[12] represents an unconstitutional infringement on the right to privacy and the guarantees of due process. In implementing that section, the State Department of Public Welfare has devised the Child Abuse and Neglect Report and Inquiry System (CANRIS). CANRIS is a computerized system designed to collect and store the confidential information gathered by the state from the inception of an investigation through final disposition. It is clear from the expressed purpose of CANRIS that it goes far beyond the permissible maintenance of investigatory files. The mere filing of a report of child abuse is cause enough for the system to operate. The record in this case indicates that CANRIS places labels of "perpetrator" on those parents who are ensnarled into its web--a conclusion reached by the state without any judicial determination. Similarly, CANRIS may label the

report as "validated," which by the terms of its operation manual is appropriate where "the investigating worker has proved that neglect or abuse exists." This use of information gathering and dissemination absent a judicial determination of abuse neglect is an impermissible violation of due process and right to privacy. Of course, the state may maintain investigative files. However, to the extent that CANRIS purports in any way to be a clearinghouse of child-abuse information without a judicial determination thereof, it is an unconstitutional infringement on the rights of the parents.

The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*, 424 U.S. 693 (1976). In that case, the Supreme Court held that an interest in one's reputation alone was not a "liberty" or "property" interest requiring due process before it could be altered by the State. The Court carefully distinguished "matters relating to marriage, procreation, contraception, family relationship, and child rearing and education" as being "far afield" from that plaintiff's claim. 424 U.S. at 713. Therefore, we find that the current use of a central registry for child-abuse reports is unconstitutional.

Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency.[13] An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.

Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard.[14] After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court.

Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"--language which assumes that such care or protection is needed.

It is Sections 17.05 and 17.06 that are frought with constitutional defects. After the State takes emergency custody of the child and there has been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should

be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and, instead, places a clearly unconstitutional burden on the parents, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05 (b) (2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process.

The questions remains as to how long the children, under these emergency situations, may be separated from their parents without a hearing. We regard Section 17.05's suggestion of a ten-day period to be constitutionally acceptable although, in the view of this court, the five-day period upheld in *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), would offer a better solution. The ten-day period, however, may not run from the "date of the [initial] order." Other summary deprivations of a property or liability interest have been upheld for a period measured from the date of the deprivation. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). The record in the instant case reflects that the date of the seizure and the date of the initial orders may not be the same. Therefore, what this court perceives to be the constitutional limit of ten days must run from the

date on which the State removed the children from the custody of their parents.

In particular, the State may not obtain a ten-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b) (2), institute a suit affecting the parent-child relationship and obtain another ten-day ex parte order under Section 11.11(a) (4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a twenty-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This court reiterates that under no circumstances, either under Chapter 17 or under Section 11.11(a) (4), may the State retain custody of the child for more than ten days without a complete adversary hearing with notice to the parents.

At the required hearing, the State must make a clear showing that continued custody is necessary to protect the child from physical danger. Even a temporary order under Section 11.11 may be based on no less a showing. Should the State be entitled to continued custody, the nature of the interests here require that a suit affecting the parent-child relationship should commence immediately so that the swiftest resolution of the merits may be obtained.

Standard of Proof. Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa, supra.*[15]

Appointment of Counsel. Section 11.10 provides in pertinent part:

> (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney at sic litem has been appointed for the child or unless the court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.
>
> ....
>
> (c) The court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the suit.

The plaintiffs have argued that this provision violates the due process clause of the constitution by not requiring the appointment of an attorney for the child. This court agrees. Certainly, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). In a suit for the involuntary termination of parental rights, the child's interest is generally distinct from that of either the State or the parents. In *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court recognized the separate interest of a child in a juvenile delinquency proceeding as one deserving of constitutional protection.[16] The mere fact that a proceeding under the TEXAS FAMILY CODE is labeled "civil" and a delinquency proceeding as "criminal" simplistically ignores an analysis of the real interests involved and the rights of all parties to a fair hearing. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). Therefore, in any proceeding in which the termination of the parent-child relationship is sought, the court is required to appoint counsel to represent the

interests of the child and require the parents to pay for that representation, if they are able to do so. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). If, as the statute suggests, another party would adequately represent the interests of the child, an appointment of counsel for the child would be unnecessary as long as such representation was through an attorney. Section 11.10 allows another party to represent the child only if there are no adverse interests. While this condition is constitutionally sufficient on its face, it has been applied unconstitutionally to the extent that the state itself has been appointed as the other party to represent the child. We have repeatedly herein emphasized the separate competing interests necessarily involved in any suit affecting the parent-child relationship. The interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits.

Because of the requirement of an attorney for the child at these proceedings, it follows that it must include representation at an "emergency" proceeding under Chapter 17, the result of which may be the institution of a suit for the termination of the parent-child relationship.

With regard to the appointment of counsel for the parents at any proceeding for the termination of parental rights, it is agreed that the plaintiffs in the *Sims* case, not being indigent, do not raise the issue. The *Woods* case was consolidated with the *Sims* case solely on the right of indigent parents to counsel. This court has carefully studied the arguments of counsel and we concur with the defendants that the named plaintiffs in the *Woods* case lack standing to raise that issue. The record is clear that both plaintiffs Woods and Troncosa were represented in the termination proceedings by counsel provided by the Houston Legal Foundation, a legal services corporation.

The *Woods* case is a class action pending before another judge of this court. In light of recent decisions of this Circuit, it appears that our limited consolidation of the *Woods* case before class certification was ill-advised. *See McArthur v. Southern Airways, Inc.*, 556 F. 2d 298 (5th Cir. 1977); *Satterwhite v. City of Greenville*, ___F.2d___, No. 75-3377 (5th Cir., August 12, 1977). Because there has been no decision as to the maintainablitiy of a class in that case, we only consider the standing of the two named plaintiffs and direct that the issue of the right to counsel for parents in the putative class remain pending with the *Woods* case.

Therefore, for the reasons stated herein, the court finds that the following provisions of Title 2, TEXAS FAMILY CODE--Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c), and 34.08--are unconstitutional on their face; and the defendants are permanently enjoined from applying and enforcing these provisions. Furthermore, the court finds that the use of CANRIS as provided for in Section 34.06 for information gathering and dissemination of child abuse reports absent a judicial determination of abuse or neglect and the use of Section 11.11(a)(4) in conjunction with Chapter 17 to deprive parents of custody of their children for longer than ten days without an adversary hearing are unconstitutional applications of these provisions; and the defendants are permanently enjoined from so applying or enforcing them.

Finally, the plaintiffs have sought monetary relief in the nature of actual damages and punitive damages for what the First Amended Complaint describes as a "wreckless, wilful and wanton disregard" of their rights. Upon careful consideration of the facts of this case, the nature of the constitutional challenge, and the decision of this court, we find no evidence to support the award of any monetary damages.

DONE at Houston, Texas, on the 12th day of *October*, 1977.

s/s
Joe Ingraham
Senior United States Circuit Judge

s/s
John V. Singleton
United States District Judge

s/s
Ross N. Sterling
United States District Judge

FOOTNOTES

[1] The relevant sections of Chapter 17 of the TEXAS FAMILY CODE are as follows:

Section 17.01. Taking Possession in Emergency.

An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle. . . . The child shall be delivered immediately to the court.

Section 17.02. Hearing.

Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

Section 17.03. Notice.

The proceeding under Section 17.02 of this code may be held without notice.

Section 17.04. Grounds and Disposition.

On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

Section 17.05. Duration of Order.

(a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

(1) order such restoration of possession; or

(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction.

Section 17.06. Modification.

On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child.

[2] *Section 11.11. Temporary Orders.*

(a) In a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child, including but not limited to an order:

....

(4) taking the child into the possession of the court or of a person designated by the court;

....

(b) Temporary orders under this section are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally.

[3] *Section 11.06. Transfer of Proceedings.*

(a) If venue is imporperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

[4] As an example of the Supreme Court's Permitting possible intervention after *Trainor* because of the peculiar nature of the dispute and the interests involved, *see Doe v. Maher*, 414 F.2d

1368 (D. Conn. 1976), *vacated and remanded on other grounds*, ___ U.S. ___, 45 U.S.L.W. 3820 (No. 76-878, June 20, 1977).

[5] For example, the plaintiffs complain of the methods by which child-abuse reports are received recorded and the fact that even anonymous report of child abuse will label the parents as "child abusers" in a central registry, to become part of a national registration system before any judicial proceeding of even an emergency nature. Title 2, TEXAS FAMILY CODE § 34.06.

[6] Some commentators have viewed such a finding as creating an exception of "futility" or "bias" to otherwise applicable *Younger* principles. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1324-26 (1977).

[7] In a recent case, *Ross v. Houston Independent School District*, ___ F.2d ___ (5th Cir. 1977) [Slip Opin. Sept. 8, 1977], the court held:

> The abstention doctrines do not embody jurisdictional principles nor are they to be considered as rules of law. Rather, their application is committed to the exercise of a sound discretion based on the facts of each case. *Hill v. City of El Paso, Texas*, 437 F.2d 352 (5th Cir. 1971). The piecemeal results and delays attendant to abstention should not be imposed on the parties to a federal proceeding unless state court action holds realistic promise of avoiding constitutional issues. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Any consideration of abstention, whether under *Pullman* or other doctrines ["(2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket," C. A. Wright, Law of Federal Courts, 3d ed. 218], must take into primary account its effects on the rights sought to be protected in the court asked to stay its hand.

[8] *See* Title 2, TEXAS FAMILY CODE §§ 34.05(d), *infra* at n.9, which allows the institution of a Chapter 17 proceeding during or as a result of a Chapter 34 investigation.

[9] (c) The investigation shall include a visit to the child's home, a physical and psychological or psychiatric examination of all the children in that home, and an interview with the subject child. If

admission to the home, school, or any place where the child may be, or permission of the parents or persons responsible for the child's care for the physical and psychological or psychiatric examinations cannot be obtained, then the juvenile court, or the district court, upon cause shown, shall order the parents or the persons responsible for the care of the children, or the person in charge of any place where the child may be, to allow entrance for the interview, above examinations, and investigations.

(d) If, before the investigation is complete, the opinion of the investigators is that immediate removal is necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this code for temporary care and protection of the child.

[10] *Id.*

[11] Section 34.05(e) requires the appropriate agency to make a complete written report of their investigation.

[12] *Section 34.06. Central Registry.*

The State Department of Public Welfare shall establish and maintain, in Austin, Texas, a central registry of reported cases of child abuse or neglect. The department may adopt rules and regulations as are necessary in carrying out the provisions of this section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system.

[13] The relevant portions of Chapter 17 are set out in note 1, *supra*.

[14] The standard of Section 17.01 is far more acceptable than the one found to be unconstitutional by the court in *Roe v. Conn*, 417 F. Supp. 769 (1976). In that case, Alabama Code, Title 13, § 352(4) provided for emergency custody of the child when "its welfare requires."

[15] *See also* National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 26 (1969); *Singleman*, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings, 17 ARIZ. L. REV. 1055, 1087 (1975).

[16] *Cf. Hegwood v. Kindrick*, 264 F. Sup. 720 (S.D. Tex. 1967).

ARTICLE 11

JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-665
Defendants.	§	
DOROTHY MAE WOODS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-1120
Defendants.	§	

JUDGMENT

Consistent with the opinion of this Court entered in the above causes on October 12, 1977, IT IS ORDERED, ADJUDGED AND DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents

before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing physical, psychological, or psychiatric examinations is necessary to aid in the investigation of abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their direction, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *23rd* day of *February*, 1978.

s/s

JOE INGRAHAM
Senior United States Circuit Judge

s/s

JOHN V. SINGLETON, JR.
United States District Judge

s/s

ROSS N. STERLING
United States District Judge

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ARTICLE 12

AMENDED JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-665
DOROTHY MAE WOODS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-1120

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

s/s
JOE INGRAHAM
Senior United States
Circuit Judge

s/s
JOHN V. SINGLETON, JR.
United States District Judge

s/s
ROSS N. STERLING
United States District Judge

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By s/s
C. J. Carl
Assistant Attorney General

Attorneys for Defendants

ARTICLE 13

DEFENDANTS' NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS AND SHAWANA EVETTE SIMS,	§	
Plaintiffs	§	
vs.	§	Civil Action No.
HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, GENE LEGE, INDIVI-	§	76-H-665

DUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Defendants

§§§

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s/s

C. J. CARL
Assistant Attorney General

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

VOLUME II

APPENDIX

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,

v.

JOHN PLEASANT SIMS, ET AL.

* * *

APPEAL FROM THE U.S. DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT FILED
JULY 3, 1978
PROBABLE JURISDICTION NOTED
OCTOBER 30, 1978

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ARTICLE 14

ORIGINAL PETITION IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

ARTICLE 14, ORIGINAL PETITION IN SUIT AFFECTING THE PARENT-CHILD RELATIONSHIP

To the Honorable Ernest Coker, Judge of Juvenile Court ____ of Montgomery, County, Texas.

This suit is brought by Carol B. Jones Petitioner who is a resident of Montgomery County, Texas.

This court has continuing jurisdiction of this suit.

The following child is the subject of this suit:

Name: Paul Sims Sex: Male

Birthplace: Harrison County, Texas Birthdate: 12-10-67

Present Residence: Rt. 3, Box 1304, Conroe, Texas

The mother of the child is Mary L. Sims who was born 12-5, 1942, and who resides at Rt. 3, Box 1304, Conroe, Texas.

The father of the child is John P. Sims who was born 4-23, 1942, and who resides at Rt. 3, Box 1304, Conroe, Texas.

There are no court-ordered conservatorships, guardianships, or other court-ordered relationships affecting the child in this suit.

No property is owned or possessed by the child.

Petitioner alleges that the appointment of a Managing Conservator by the Court would be in the best interest of the child and Petitioner requests that the Court appoint Helen Juris, Supervisor, Texas Department of Public Welfare as Managing Conservator contingent upon Montgomery County Funds being made available to pay the cost of foster care for the child. As grounds for such request Petitioner alleges:

I.

That on 3-25-76, said child, Paul was examined by Dr. Marie Surgi and was found to have severe bruises all over his body. (see attached reports).

II.

That said child states that he was paddled by his father.

III.

That on 3-27-76, said child was hospitalized for treatment for his injuries.

IV.

That on 5-5-76, John Singleton, District Judge, U.S. District Court, Southern District of Texas, ordered that Harris County Child Welfare Unit release the child to his parents as the child was being held without legal authority.

V.

That the physical and emotional well-being of the child is endangered by his being returned to his parents.

Petitioner alleges that the issuance of a Writ of Attachment is necessary to protect the child from further abuse or neglect and, the appointment of a managing conservator would be in the best interest of the child and requests the Court to make this appointment as provided by Sec. 14.01 (a), Texas Family Code.

Petitioner requests the Court appoint a guardian ad litem to represent the interest of the child as provided by Sec. 11.10 (a), Texas Family Code.

Petitioner requests the Court to order the respondents to pay a reasonable amount of child support pending

further orders of the Court.

Petitioner prays that citation be issued to all persons so entitled under the law.

Petitioner prays the Court to enter its order in accordance with the allegations in this petition.

Petitioner prays for general relief.

ARTICLE 15

DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

ARTICLE 15, DEFENDANTS' ANSWERS TO PLAINTIFFS' REQUESTS FOR ADMISSIONS

The following are the answers of defendants to the plaintiffs' requests for admissions served on defendants on September 20, 1976:

1. On March 25, 1976, adult and minor plaintiffs maintained a residence located at Route 3, Box 1304, Conroe, Montgomery County, Texas.

ANSWER: Defendants admit the matter stated therein.

2. On March 25, 1976, the three minor plaintiffs were enrolled in and regularly attending classes at John G. Osborne Elementary School in Houston, Harris County, Texas, of which adult plaintiffs paid a monthly tuition charge to the Houston Independent School District.

ANSWER: Defendants admit the matter stated therein.

3. Minor plaintiff Sabrina Marie Sims, the only natural child of adult plaintiffs, was born to them August 16, 1967, and is now age nine years.

ANSWER: Defendants admit the matter stated therein.

3a. Minor plaintiff Paul Edward Sims was born December 10, 1967, is now age eight years, and was adopted by adult plaintiffs through Harris County Child Welfare Unit (hereafter referred to as Child Welfare) pursuant to Decree of Adoption granted July 18, 1974, by Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas (hereafter referred to as Juvenile Court).

ANSWER: Defendants admit the matter stated therein.

3b. Minor plaintiff Shawana Evette Sims was born March 2, 1969, is now age seven years, and was adopted by adult plaintiffs through Child Welfare pursuant to Decree of Adoption granted by Judge Lowry on August 12, 1975.

ANSWER: Defendants admit the matter stated therein.

4. On March 25, 1976, in response to a telephone report of child abuse made by personnel of John G. Osborne Elementary School regarding only the minor plaintiff Paul Edward Sims, Child Welfare's agent and employee Caseworker Rex Downing went to the school.

ANSWER: Defendants admit the matter stated therein.

4a. That Rex Downing took possession and control of not just Paul Edward Sims regarding whom the report of child abuse had been made, but the two other Sims Children as well, and did so shortly after 1:30 P.M. on that day, caused all three to be transported to the Child Welfare Clinic at 4040 Milam, Houston, Texas, where all three were examined by Dr. Marie L. Surgi over the express objection of adult plaintiffs.

ANSWER: Defendants deny that Rex Downing took possession and control of the Sims children shortly after 1:30 P.M. because Mr. and Mrs. Sims gave permission for their children to be taken from the school to the Harris County Child Welfare Clinic and because Rex Downing did not take possession and control of the Sims children until after 5:00 P.M. at the Harris County Child Welfare Clinic; and defendants deny that all three Sims children were examined by Dr. Marie L. Surgi over the express objection of Mr. and Mrs. Sims because Mr. and Mrs. Sims gave permission for Dr. Surgi to examine the Sims' children.

5. No writ of a magistrate was obtained by Downing prior to his taking possession and control of the three minor plaintiffs, and the only notice given to adult plaintiffs of the seizure of their children was by a telephone call to John Sims on his job by the school principal.

ANSWER: Defendants admit that no writ of magistrate was obtained by Rex Downing prior to taking possession and control of the three minor plaintiffs but defendants deny the remainder of this request because there was also a telephone call to Mary Sims and because both Mr. and Mrs. Sims had actual notice when possession of their children was taken at the Harris County Child Welfare Unit.

6. That Caseworker Downing who went to the school on March 25, 1976, to make investigation interviewed the minor plaintiff Paul Sims who had been the subject of the telephone report of abuse for "Maybe a couple of minutes, three minutes."

ANSWER: Defendants admit the matter stated therein.

6a. Neither of the parents were interviewed prior to his taking possession and control of their three children.

ANSWER: Defendants deny the matter stated therein.

7. The minor plaintiffs were not delivered to any court on the date of their seizure shorly (sic) after 1:30 P.M., March 25, 1976.

ANSWER: Defendants admit that minor plaintiffs were not delivered to any Court on the date they were taken into possession but otherwise defendants deny the matters stated in this request because minor plaintiffs were not taken into possession on March 25, 1976, until after 5:00 P.M.

8. The following day, March 26, 1976, at 4:45 P.M., Betsy C. Conner filed A Suit For Protection of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code, which was docketed under Cause No. 38, 295 in the Juvenile Court Number One of Harris County, Texas, and in which all three minor plaintiffs were made subjects of suit.

ANSWER: Defendants admit the matter stated therein.

9. No names or places of residence of the parents of persons responsible for the care of the three minors appear at any place in the suit referred to in Paragraph 7, supra, although the Petitioner therein requests "that citation and notice be issued to all persons named."

ANSWER: Defendants admit the matter stated therein if the reference to Paragraph 7 is intended to be Paragraph 8.

10. Fifteen minutes after time of filing of such suit and at 5:00 P.M. on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court entered an Ex Parte Order by the terms of which Gene Lege, Director of Harris County Child Welfare was made temporary managing conservator of the three minor plaintiffs.

ANSWER: Defendants admit the matter stated therein.

10a. On its face such Ex Parte Order recites that the matter was presented to the Court in chambers, without notice to or hearing afforded the adult plaintiffs.

ANSWER: Defendants admit the matter stated therein.

10b. Harris County Child Welfare did not deliver the three minor plaintiffs to the Court on March 26,

1976, nor did Judge Lowry require such delivery.

ANSWER: Defendants deny the matter stated therein because the three minor plaintiffs were constructively delivered to the Court on March 26, 1976, when the Petition was filed with the Court.

11. No notice, citation or process of any kind was ever issued or served upon the adult plaintiffs in connection with the suit docketed as Cause No. 38,295 filed March 26, 1976.

ANSWER: Defendants admit the matter stated therein.

12. On March 31, 1976, counsel for the adult plaintiffs filed a Motion to Modify Temporary Orders for Emergency Protection of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "Received" and "JUV" by the Clerk of the Juvenile Court but were returned to counsel by the Clerk who had been instructed not to set a hearing.

ANSWER: Defendants deny the matter stated therein except that it is admitted that the instruments cited were stamped "JUV". Moreover, defendants specifically deny that the Clerk was instructed not to set a hearing but rather contend that the adult plaintiffs' counsel voluntarily withdrew the cited instruments.

13. On March 31, 1976, counsel for adult plaintiffs also filed a Petition For Writ of Habeas Corpus seeking return of the three minor plaintiffs, which suit was docketed as Cause No. 1,069,341 in the Juvenile Court Number One of Harris County, Texas, and upon which a hearing was set for April 5, 1976, at 10:30 A.M.

ANSWER: Defendants admit the matter stated therein.

14. Adult plaintiffs caused notice of the filing of their Petition For Writ of Habeas Corpus and of the hearing set thereon to be served upon Gene Lege, Director of Harris County Child Welfare and also issued Subpoenas for attendance of witnesses.

ANSWER: Defendants admit the matter stated therein.

15. On the date and at the time scheduled for hearing on the Petition For Writ of Habeas Corpus, Judge Lowry determined that all of the plaintiffs were residents of Montgomery County, Texas.

ANSWER: Defendants admit the matter stated therein.

15a. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the habeas corpus proceeding, although Judge Lowry had personal knowledge the there (sic) minor plaintiffs were restrained in Harris County, Texas, by virtue of his own Ex Parte Order entered March 26, 1976.

ANSWER: Defendants admit the matter stated therein.

15b. The Docket Sheet entry made in Cause No. 1,069,341 in the handwriting of Robert L. Lowry, Judge of the Juvenile Court Number One of Harris County, Texas, on April 5, 1976, reads as follows: "Venue in Montgomery County - Case transferred to Montgomery County."

ANSWER: Defendants admit the matter stated therein.

16. Later and at 4:47 P.M. on April 5, 1976, Betsy C. Conner filed a second suit in Cause No. 38,295 on the docket of the Juvenile Court Number One of Harris

County, Texas, entitled Original Petition In Suit Affecting the Parent-Child Relationship.

ANSWER: Defendants admit the matter stated therein.

17. At a time subsequent to the 4:47 P.M. filing of the Original Petition referred to in Paragraph 15, supra, but still on April 5, 1976, Judge Lowry entered a second Ex Parte Order continuing temporary managing conservatorship, possession and control of the three minor plaintiffs in Gene Lege, Director, Harris County Child Welfare.

ANSWER: Defendants admit the matter stated therein.

17a. This second Ex Parte Order setting both temporary and final hearings in the second suit shows them both to be set for "the ___ day of _____, 19__ at ___ o'clock ___m." and appoints "An attorney _____ ... to serve as guardian ad litem and attorney ad litem and represent the minor child(ren) at all hearings ..." On its face this same Order recites it was presented to the Court in chambers, again without notice to or hearing afforded the adult plaintiffs.

ANSWER: Defendants admit the matter stated therein.

17b. On May 5, 1976, at hearing in the Federal Court, there was testimony adduced that the blanks appearing in the Order had never been filled in.

ANSWER: Defendants admit the matter stated therein.

18. On April 6, 1976, Docket Sheet entries made in the handwriting of Judge Lowry show the Suit Affecting The Parent-Child Relationship (Cause No. 38,295) and the Habeas Corpus proceeding (Cause No.

1,069,341) were transferred to the Juvenile Court of Montgomery County, Texas, while the minor plaintiffs remained in Harris County in the possession of Harris County Child Welfare.

ANSWER: Defendants admit the matter stated therein.

19. From date of seizure of the three minor plaintiffs on March 25, 1976, through April 6, 1976, there was not notice to or opportunity for hearing afforded any of the plaintiffs by the Juvenile Court of Harris County, Texas, nor were the minor plaintiffs ever delivered to the Court by Harris County Child Welfare during such period.

ANSWER: Defendants deny the matter stated therein because there was a Habeas Corpus hearing before the Juvenile Court of Harris County, Texas, on April 5, 1976, at which the two female minor plaintiffs were present. Also, the plaintiffs had the opportunity to file a Motion to Modify and receive a hearing on that motion.

20. On April 9, 1976, the full file in Cause No. 38,295 transferred by the Juvenile Court Number One of Harris County, Texas, was received by the Juvenile Court of Montgomery County, Texas, and docketed under Cause No. 3,030.

ANSWER: Defendants admit the matter stated therein.

21. From April 6, 1976, when the file was received by the Montgomery Juvenile Court up to and including May 5, 1976, the first date of hearing before this Court, no notice, citation or process of any kind was issued or served upon the adult plaintiffs in Cause No. 3,030 nor were they afforded opportunity for hearing before the Juvenile Court of Montgomery County, Texas.

ANSWER: Defendants admit the matter stated therein.

21a. The three minor plaintiffs remained in the possession and control of Harris County Child Welfare during such period referred to in item 21.

ANSWER: Defendants admit the matter stated therein.

22. On May 4, 1976, still seeking return of their children, adult plaintiffs filed an Application For Leave To File Writ of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting in Houston. Such Application was denied by the Court for lack of jurisdiction on May 4, 1976.

ANSWER: Defendants admit the matter stated therein.

23. Plaintiffs' First Complaint was filed with the Federal Court on April 19, 1976.

ANSWER: Defendants admit the matter stated therein.

23a. The first hearing afforded plaintiffs after seizure of the three minors on March 25, 1976, was that of May 5, 1976, before Honorable John V. Singleton, Jr., who ordered return of the three minor plaintiffs to the adult plaintiffs.

ANSWER: Defendants deny the matter stated therein because there was a Habeas Corpus hearing held in Harris County Juvenile Court on April 5, 1976.

24. Nine days after this Court ordered return of the minor plaintiffs, a third suit was begun by the filing of an Original Petition In Suit Affecting the Parent-Child Relationship which was docketed as Cause No. 3,090 in the Juvenile Court of Montgomery County, Texas, on

May 14, 1976.

ANSWER: Defendants admit the matter stated therein.

25. The suit filed in Montgomery County on May 14, 1976, referred to in Paragraph 24, supra, pertained only to the minor plaintiff Paul Edward Sims and had attached as an Exhibit the identical Exhibit attached to the suit filed March 26, 1976, in Harris County, Texas, under Cause No. 38,295.

ANSWER: Defendants admit the matter stated therein.

26. Based upon medical information and other information which was fifty (50) days old, Ernest L. Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas, issued an Ex Parte Writ of Attachment for the minor plaintiff Paul Edward Sims on May 14, 1976.

ANSWER: Defendants admit the matter stated therein.

27. On May 21, 1976, counsel for plaintiffs made application for and Honorable John V. Singleton, Jr. entered a Temporary Restraining Order which was followed by an Order of Preliminary Injunction of this three-judge court entered June 18, 1976, restraining and enjoining defendants from filing or prosecuting any state suit based upon the state statutes to which plaintiffs have lodged this constitutional challenge.

ANSWER: Defendants admit the matter stated therein.

28. This three-judge Court found "irreparable harm and injury to plaintiffs: 1) by the very fact that in the initial proceeding initiated by the State the plaintiffs' family unit was disrupted for a total of forty-two (42)

days without any type of relief afforded to plaintiffs; and 2) if the defendants were allowed to initiate further proceedings plaintiffs would be placed in a similar situation as they had been prior to obtaining Federal Court relief."

ANSWER: Defendants admit the matter stated therein.

29. The names of all the plaintiffs now appear as perpetrator and/or victims of child abuse in a Central Registry maintained by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (date of initial seizure of the three minor plaintiffs) and May 5, 1976 (the date on which minor plaintiffs were ordered restored to adult plaintiffs by this Court), although no judicial finding of any such abuse has been made.

ANSWER: Defendants admit the matter stated therein except that May 5 is not the date of a separate "incident", but rather is merely the date on which the Montgomery County Department of Public Welfare worker filed a CANRIS report on the referral of the Sims matter from Harris County.

29a. That Raymond Vowell, Commissioner, State Department of Public Welfare of Texas, has answered by Interrogatory No. 10 that "the source of the report has been deleted in accordance with §34.08 of the Texas Family Code."

ANSWER: Defendants admit the matter stated therein.

30. Information gathered by the Harris County Child Welfare in the course of adoption of the minor plaintiffs Paul Edward Sims and Shawana Evette Sims by the adult plaintiffs in 1974 and 1976 was not retired and sealed following such adoptions.

ANSWER: Defendants deny the matter stated therein because the information gathered by Harris County Child Welfare in the course of the adoption of the minor plaintiffs, Paul Edward Sims and Shawana Evette Sims, by the adult plaintiffs in 1974 or 1975 was "retired" because it was placed in closed files separate and apart from other files at the Harris County Child Welfare Unit.

30a. That such information was referred to and used by such agency and also transmitted to the Montgomery County agency of the Department during the time of their seizure, possession and control of the minor plaintiffs.

ANSWER: Defendants admit that such information was referred to and used by the Harris County Child Welfare Unit employees, but Defendants deny that such information was also transmitted to the Montgomery County agency of the department.

31. That John Pleasant Sims and Mary Carter Sims were required by the State Department to attend counseling sessions under Doctors Blair and Rita Justice at the Southwestern Institute for Group and Family Therapy.

ANSWER: Defendants deny that John Pleasant Sims and Mary Carter Sims were required by the State department of (sic) attend counseling sessions under Doctors Blair and Rita Justice, but defendants admit that they were requested to do so.

31a That the Sims were referred to Dr. A. A. Johnstone, for psychiatric evaluation by Dr. Blair Justice, acting as an agent of the State Department.

ANSWER: Defendants admit that Mr. and Mrs. Sims were referred to Dr. E. E. Johnstone, not Dr. A. A. Johnstone, by Doctor Blair Justice, but defendants deny

that Dr. Justice was acting as an agent for the State Department.

32. That on or about March 31, 1976, and before the May 5, 1976, hearing in Federal Court, that Rex Downing as caseworker for the Harris County Child Welfare Unit knew or had cause to know of Paul Sims' statements that "his teacher Mrs. Rhea had spanked him on March 25, 1976, at the John G. Osborne Elementary School.

ANSWER: Defendants admit that on some date before the May 5, 1976, hearing in Federal Court, Rex Downing knew or had cause to know of Paul Sims' statements alleging that his teacher had spanked him at school on March 25, 1976.

33. That Paul Edward Sims was given a psychological evaluation by the State Department, the result of which has not been furnished to plaintiffs.

ANSWER: Defendants admit the matter stated therein.

34. That Rex Downing, Harris County Child Welfare Worker recommended Termination of the Parent-Child Relationship between the Sims and Paul Edward Sims and a Severe Interruption of the Parental Relationship between the Sims and Sabrina E. and Shawana Y. Sims.

ANSWER: Defendants admit that Rex Downing had recommended Termination of the Parent-Child Relationship between the Sims and Paul Edward Sims, but deny that he had recommended a "Severe Interruption of the Parental Relationship between the Sims and Sabrina E. and Shawana Y. Sims."

ARTICLE 16

DEFENDANTS' ANSWERS TO PLAINTIFFS' ORIGINAL INTERROGATORIES (VOWELL)

ARTICLE 16, DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES

NOW COMES RAYMOND W. VOWELL, Commissioner of Public Welfare, Defendant in the above-styled and numbered cause and answers Plaintiff's Original Interrogatories as follows:

INTERROGATORY NO. 1. "State your full name and address."

ANSWER. Raymond W. Vowell
John H. Reagan Building
Austin, Texas

INTERROGATORY NO. 2. "State the nature of your employment on March 25, 1976 and your official capacity in connection with such employment."

ANSWER. Commissioner of Public Welfare

INTERROGATORY NO. 3. "Are you responsible for discharging all executive and administrative functions of the Texas State Department of Public Welfare?"

ANSWER. Yes.

INTERROGATORY NO. 4. "Does the Texas State Department of Public Welfare receive any federal funding for conducting activities related to child abuse? If so, please state each and every federal agency from whom such funds are received."

ANSWER. Yes. The Department of Health, Education and Welfare.

INTERROGATORY NO. 5. "Pursuant to the provisions of §34.06, Title 2, Texas Family Code, does your department maintain in Austin, Texas a central registry of reported cases of child abuse?"

ANSWER. Yes.

INTERROGATORY NO. 6. If your answer to interrogatory No. 5 is in the affirmative, has your department adopted rules and regulations to carry out the provisions of §34.06, Title 2, of the Texas Family Code?"

ANSWER. Yes.

INTERROGATORY NO. 7. "If your answer to interrogatory No. 6 is in the affirmative, will you attach a copy of such regulations without a Motion to Produce?"

ANSWER. Yes, Attached hereto as exhibit "A" are section 7222 of the current Social Services Handbook, forms and instructions for the Child Abuse and Neglect Report and Inquiry System (CANRIS), and amended rules adopted by the Board of Public Welfare.

INTERROGATORY NO. 8. "If your answer to interrogatory No. 5 is in the affirmative, does such central registry contain the names of any of the minor or adult plaintiffs?"

ANSWER. Yes.

INTERROGATORY NO. 9. "If your answer to interrogatory No. 8 is in the affirmative, state the names and dates such names were placed in such registry and what caused such information to be placed in such registry."

ANSWER. The names of Paul Sims, Sabrina Sims, Shawana Sims and John Sims were placed in the CANRIS file on March 25, 1976, as a result of a report of child abuse. The names of Paul Sims, Sabrina Sims, Shawana Sims, John Sims and Mary Sims were placed in the CANRIS file on May 10, 1976, as a result of another report of child abuse.

INTERROGATORY NO. 10. "If your answer to interrogatory No. 8 is in the affirmative, will you attach a copy of such information without a Motion to Produce?"

ANSWER. Yes. Attached hereto as exhibit "B", are copies of information contained in the CANRIS file, except that the source of the report has been deleted in accordance with §34.08 of the Texas Family Code.

INTERROGATORY NO. 11. "If your answer to interrogatory No. 8 is in the affirmative, has such information been transmitted to any other registry or agency? If so, what information was sent, when was it sent, and to whom?"

ANSWER. The names of the minor or adult plaintiffs have not been transmitted to any other registry or agency. However, statistical information which does not identify any individuals and which is derived from all combined reports in the CANRIS file is sent upon request to the National Study on Child Neglect and Abuse Reporting (formerly the National Clearinghouse on Child Abuse and Neglect), c/o The American Humane Association, Children's Division, P. O. Box 1319, Denver, Colorado, 80201. No such request has been received since January, 1976.

INTERROGATORY NO. 12. "If your answer to interrogatory No. 8 is in the affirmative, has any information regarding the minor or adult plaintiffs been removed from any registry, state or national, or any other agency?"

ANSWER. Information regarding the minor and adult plaintiffs in the CANRIS file has not been removed. I have no knowledge of information regarding the minor or adult plaintiffs in any other state or national registry or agency.

INTERROGATORY NO. 13. "When an adoption from the Department has been closed, are the records from the local agencies pulled and sealed?"

ANSWER. On entry of a decree of adoption the records required by the Family Code to be maintained in the Central Record File are pulled and sealed, and records maintained by local child welfare units are removed from active files and placed in inactive secured files.

INTERROGATORY NO. 14. "For the period beginning September 1, 1975 through May 31, 1976, state the total number of reports received by the Texas State Department of Public Welfare under color or provision of §§34.01, §§34.02, Title 2, Texas Family Code, if any."

ANSWER. The Department's computerized statistical information in the CANRIS file concerns only the number of abuse/neglect reports received by the Department and reported to CANRIS. From September 1, 75 to May 31, 1976, there were 27,671 reports made to CANRIS. This is the number of reported incidents, not the number of children or families. There is generally more than one child per reported incident, and a family may be reported more than once if abuse or neglect reoccurs. Under §34.02 of the Family Code the information requested would also include reports of truant and runaway children. Full information concerning these reports is available only in individual case records located in over 160 offices throughout the state and certain statistical information concerning such reports could be obtained from the Department's computerized Social Services Management (SSMS) file only by special programming. If this is done the implementation of revisions in the SSMS system which are now being developed will be delayed by an amount of time equal to that required to do the special programming.

INTERROGATORY NO. 15. "For the total number, if any, given in your answer to interrogatory No. 14, state separately as to each such report:

a. The date and time of receipt of such report,

ANSWER. Special programming would be required to extract this information from the computerized statistical information contained in the CANRIS file. It is estimated that the special programming necessary to obtain the information requested in Interrogatories 15a, 15c, 15e and 15f would take two weeks if this programming were given priority over current assignments. If this is done the implementation of revisions in the CANRIS system which are now being developed will be delayed by an amount of time equal to that required to do the special programming.

b. Whether such report was oral or in writing,

ANSWER. This information is not included in the computerized statistical information contained in the CANRIS file. The full information requested can be obtained only by doing a desk review of child welfare cases in over 160 offices throughout the state. It is estimated that this would take a total of 25 manpower days per region and that the information gathering process would take two months if all the other requested information were gathered at the same time.

c. Whether such report was from an identified source or from an anonymous source,

ANSWER. From the inception of CANRIS on December 3, 1973 to May 31, 1976, 3,245 (or 5%) out of 65,843 initial reports had anonymous sources. The specific information requested is not currently available from existing reports. See the answer to Interrogatory 15a.

d. If same was an oral report, state whether it was made by telephone,

ANSWER. See the answer to Interrogatory 15b.

e. Whether any information received as a result of such report was placed in the "Central Registry" provided for by §§34.06, Title 2, Texas Family Code,

ANSWER. See the answer to Interrogatory 15a.

f. The date on which such information was placed in such Central Registry,

ANSWER. See the answer to Interrogatory 15a.

g. If any such information was placed in a central registry, state whether it has been disseminated to other registries,

ANSWER. Statistical information which does not identify individuals and which is derived from all combined reports in the CANRIS file is sent upon request to the National Study on Child Neglect and Abuse Reporting. See the answer to Interrogatory 11.

h. Whether any children were seized as a result of such report,

ANSWER. It is estimated that children are removed from their homes in only 10% of the cases in which abuse or neglect has been reported on one or more occasions. However, the specific information requested is not currently available in existing reports. Special programming would be required to extract this information from the statistical information contained in the Social Services Management System (SSMS) file. See the answers to Interrogatories 15a and 15b.

i. If you answer to the immediately preceding sub-interrogatory is in the affirmative, state the date and time of such seizure,

ANSWER. See the answer to Interrogatory 15h.

j. Whether any suit was thereafter filed by the State Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of such report,

ANSWER. The Department's computerized CANRIS and SSMS systems do not gather "petition filed" information except on abuse and neglect cases through CANRIS and then do not distinguish whether the material was filed under Chapters 11 or 17 of the Family Code. The CANRIS "petition filed" information is not immediately available on all CANRIS cases. Present printouts are limited to finalized validated cases, and the reports indicate only the total numbers of petitions filed with respect to twenty-three (23) distinct types of injury or abuse. Since petitions are generally filed in cases involving more than one type of injury, the currently available statistics do not provide the requested information concerning the actual number of petitions filed in relation to the number of reports received, children involved or cases being handled. Gathering the requested "petition filed" statistics on all CANRIS cases would require special programming which it is estimated could be completed within two weeks if priority were given to this assignment over other current assignments. A copy of the statistical information which is currently available is attached as Exhibit C.

k. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state whether the State Department sought termination of the parent-child relationship in such suit,

ANSWER. The full information requested can be obtained only through a desk review of child welfare cases in over 160 offices throughout the state. See the answer to Interrogatory 15b.

l. Whether any suit is pending, concluded by final trial or dismissed if such suit was filed by the State Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of any report,

ANSWER. See the answer to Interrogatory 15k.

m. If your answer to the immediately preceding interrogatory is "concluded by final trial" state whether or not same resulted in termination of the parent-child relationship."

ANSWER. See the answer to Interrogatory 15k.

16. "For the period September 1, 1975 through May 31, 1976, state the total number of petitions filed by the Texas Department of Public Welfare under color or provisions of §§17.01 and §§17.02, Title 2, Texas Family Code, if any."

ANSWER. The Department's computerized CANRIS and SSMS files do not contain the information requested. The information requested can be obtained only through a desk review of all child welfare cases in over 160 offices throughout the State. See the answer to Interrogatory 15b.

INTERROGATORY NO. 17. "For the total number, if any, given as your answer to Interrogatory No. 16, state separately as to each such petitions filed:

a. The number of children seized,

ANSWER. The full information requested can be obtained only by doing a desk review of child welfare cases in over 160 offices throughout the State. If this information were gathered at the same time as the other requested information, it is estimated that this would take an average of 15 additional manpower days per region and that the complete information gathering process would take three to four months.

b. The date and time of seizure,

ANSWER. See the answer to Interrogatory 17a.

c. The date and time of filing of such petition,

ANSWER. See the answer to Interrogatory 17a.

d. Whether counsel was appointed for the minors seized: and if so, give the name and address and date of appointment of counsel,

ANSWER. See the answer to Interrogatory 17a.

e. The names and locations of the court in which such petitions were filed and the cause number under which such petition was docketed,

ANSWER. See the answer to Interrogatory 17a.

f. The date and time the child was first delivered to the court following seizure,

ANSWER. See the answer to Interrogatory 17a.

g. The date, time, and place of the hearing held providing for temporary care and protection of the child seized,

ANSWER. See the answer to Interrogatory 17a.

h. Whether the parent, guardian, managing conservator, and/or person responsible for the care of the child received notice of such hearing,

ANSWER. See the answer to Interrogatory 17a.

i. Names of the persons present at such hearing,

ANSWER. See the answer to Interrogatory 17a.

j. The date and time of entry of any order providing for the temporary care and protection of the child seized,

ANSWER. See the answer to Interrogatory 17a.

k. Whether temporary managing conservator was appointed for the child seized,

ANSWER. See the answer to Interrogatory 17a.

l. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state the name and address of the person so appointed, any official title, and the relationship of such person to the child,

ANSWER. See the answer to Interrogatory 17a.

m. The date and manner by which the parent, managing conservator, guardian, and/or person responsible for the care of the child seized was first notified of the seizure,

ANSWER. See the answer to Interrogatory 17a.

n. The date and names, if any, by which these parents, managing conservators, guardians, and/or persons responsible for the child were first notified of the filing of such petition,

ANSWER. See the answer to Interrogatory 17a.

o. Whether or not the parent, managing conservator, guardian, and or person responsible for the care of the child was furnished a copy of the petition filed, and if so, the date on which such copy was furnished,

ANSWER. See the answer to Interrogatory 17a.

p. The date and time, if any, on which the parent, managing conservator, guardian, and/or person responsible for the care of the child was first afforded a hearing after filing of such petition,

ANSWER. See the answer to Interrogatory 17a.

q. Whether the child seized, if any, has been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child and, if so, the date and time of such return,

ANSWER. See the answer to Interrogatory 17a.

r. Whether, if the child seized has not been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child, the parent-child relationship has been terminated or termination is presently pending."

ANSWER. See the answer to Interrogatory 17a.

ARTICLE 17

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES (LOCKLEY)

ARTICLE 17, DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES

NOW COMES MARIAN LOCKLEY, Program Director for Social Services, Defendant in the above-styled and numbered cause and answers Plaintiff's Original Interrogatories as follows:

INTERROGATORY NO. 1. "What is your full name and present address?"

ANSWER. Marian Porter Lockley
114 E. Burleson
Wharton, Texas 77488

INTERROGATORY NO. 2. "State the name and address of your employer on March 25, 1976."

ANSWER. Texas State Department of Public Welfare
114 E. Burleson
Wharton, Texas
77488

John H. Reagan Building
Austin, Texas
78701

INTERROGATORY NO. 3. "Were you the chief administrative officer in charge of the operation of Montgomery County Welfare Unit?"

ANSWER. No. However, I am the Lead Program Director for Social Services for the Texas State Department of Public Welfare, outlying counties in the Houston region.

INTERROGATORY NO. 4. "Is Carol B. Jones an employee of the Montgomery County Welfare Unit?"

ANSWER. Carol B. Jones is an employee of the Texas State Department of Public Welfare assigned to Montgomery County.

INTERROGATORY NO. 5. "Please state the job

title and length of employment of Carol B. Jones."

ANSWER. Carol B. Jones is a Public Welfare Worker I and has been employed by the Texas State Department of Public Welfare for over six months.

INTERROGATORY NO. 6. "Did you or any other person instruct Carol B. Jones to file a suit affecting the parent-child relationship between the minor plaintiff Paul Sims and adult plaintiffs in Montgomery County, Texas?"

ANSWER. Yes.

INTERROGATORY NO. 7. "If your answer to Interrogatory No. 6 is in the affirmative, state the date and time of filing of such suit in Montgomery County, Texas."

ANSWER. Carol B. Jones filed such suit in Montgomery County, Texas, on the morning of May 14, 1976.

INTERROGATORY NO. 8. "Did any person connected with Montgomery County Welfare Department have personal knowledge or make personal investigation of the home of the adult plaintiffs?"

ANSWER. Assuming that Interrogatory No. 8 refers to Texas State Department of Public Welfare protective services workers assigned to Montgomery County, Texas, Carol B. Jones personally interviewed the adult plaintiffs John and Mary Sims on March 29, 1976, and March 31, 1976, in the presence of their attorney, Gladys Goffney.

INTERROGATORY NO. 9. "If your answer to Interrogatory No. 8 is in the negative, was the basis of the suit affecting the parent-child relationship filed by Montgomery County Welfare information obtained or furnished by Harris County Child Welfare?"

ANSWER. Not applicable.

INTERROGATORY NO. 10. "If your answer to Interrogatory Number nine is in the affirmative, what person furnished such information?"

ANSWER. Not applicable.

INTERROGATORY NO. 11. "What was the basis for the allegation in the Montgomery County suit filed May 14 that the physical and emotional well being of Paul Edward Sims was endangered?"

ANSWER. The allegation was based on medical reports obtained as a result of the examination of the child following receipt of a report of possible child abuse and also based on the investigation conducted as a result of the report.

INTERROGATORY NO. 12. "Did you have any medical information regarding Paul Sims later than that made by Dr. Surgi on March 25, 1976?"

ANSWER. Yes.

INTERROGATORY NO. 13. "Regarding the Montgomery County suit filed May 14, 1976, with respect to the allegation that it would be in the best interest of the child for Helen Juris to be appointed managing conservator, what would have happened to Paul Sims had Montgomery County funds not been available to pay for the cost of foster care?"

ANSWER. If county funds had been unavailable for foster care costs, the Court would have been informed by the Texas State Department of Public Welfare of the possibility of relative resources for the placement of Paul Sims.

INTERROGATORY NO. 14. "Was Carol B. Jones a licensed, practicing, attorney-at-law on May 14, 1976?"

ANSWER. No.

INTERROGATORY NO. 15. "If the answer to Interrogatory No. 14 is negative, who drafted the petition in Cause No. 3090 filed May 14, 1976?"

ANSWER. John C. Turner
Regional Attorney
Texas State Department of Public Welfare
2913 Louisiana
Houston, Texas 77006

INTERROGATORY NO. 16. "For the period beginning September 1, 1975 through May 31, 1976, state the total number of reports received by the Montgomery County Welfare Department under color of provision of Section 34.01, 34.02, Title 2, Texas Family Code, if any."

ANSWER. Assuming that Interrogatory No. 16 refers to the Texas State Department of Public Welfare protective services unit in Montgomery County, Texas, rather than the Montgomery County Welfare Department, from September 1, 1975, through May 31, 1976, 119 reports were received pursuant to Section 34.01, Texas Family Code. From January 1, 1976, through May 31, 1976, 4 reports were received pursuant to Section 34.02, Texas Family Code. Data for reports filed pursuant to Section 34.02, Texas Family Code, from September 1, 1975, through December 31, 1975, is not available.

INTERROGATORY NO. 17. "For the total number, if any, given in your answer to Interrogatory No. 16, state separately as to each such report:

a. The date and time of receipt of such report,

ANSWER. The information requested can be

obtained only by doing a desk review of all reports received by the Texas State Department of Public Welfare protective services workers assigned to Montgomery County. It is estimated that this would take a total of 5 manpower days.

b. Whether such report was oral or in writing,

ANSWER. See the answer to Interrogatory No. 17a.

c. Whether such report was from an identified source or from an anonymous source,

ANSWER. See the answer to Interrogatory No. 17a.

d. If same was an oral report, state whether it was made by telephone,

ANSWER. See the answer to Interrogatory No. 17a.

e. Whether any information received as a result of such report was placed in the "Central Registry" provided for by Section 34.06, Title 2, Texas Family Code,

ANSWER. See the answer to Interrogatory No. 17a.

f. The date on which such information was placed in such Central Registry,

ANSWER. See the answer to Interrogatory No. 17a.

g. If any such information was placed in a central registry, state whether it has been disseminated to other registries,

ANSWER. Statistical information which does not identify any individuals and which is derived from all combined reports in the CANRIS file is sent monthly to the National Study on Child Neglect and Abuse Reporting (formerly the National Clearinghouse on

Child Abuse and Neglect), c/o the American Humane Association, Children's Division, P. O. Box 1319, Denver, Colorado 80201.

h. Whether any children were seized as a result of such report,

ANSWER. No.

i. If you answer to the immediately preceding subinterrogatory is in the affirmative, state the date and time of such seizure,

ANSWER. Not applicable.

j. Whether any suit was thereafter filed by the Montgomery County Welfare Department under color of any procisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of such report.

ANSWER. No.

k. If your answer to the immediately preceding subinterrogatory is in the affirmative, state whether the State Department sought termination of the parent-child relationship in such suit.

ANSWER. Not applicable.

l. Whether any suit is pending, concluded by final trial or dismissed if such suit was filed by the Montgomery County Welfare Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of such report.

ANSWER. No.

m. If your answer to the immediately preceding interrogatory is "concluded by final trial" state whether or not same resulted in termination of the parent-child relationship.

ANSWER. Not applicable.

INTERROGATORY NO. 18. "For the period September 1, 1975 through May 31, 1976, state the total number of petitions filed by the Montgomery County Welfare Department under color of provisions of Sections 17.01 and 17.02, Title 2, Texas Family Code, if any."

ANSWER. None.

INTERROGATORY NO. 19. "For the total number, if any, given as your answer to Interrogatory No. 18, state separately as to each such petitions filed:

a. The number of children seized,

ANSWER. Not applicable.

b. The date and time of seizure,

ANSWER. Not applicable.

c. The date and time of filing of such petition,

ANSWER. Not applicable.

d. Whether counsel was appointed for the minors seized , and if so, give the name and address and date of appointment of counsel,

ANSWER. Not applicable.

e. The names and locations of the court in which such petitions were filed and the cause number under which such petition was docketed,

ANSWER. Not applicable.

f. The date and time the child was first delivered to the court following seizure,

ANSWER. Not applicable.

g. The date, time and place of the hearing held providing for temporary care and protection of the child seized,

ANSWER. Not applicable.

h. Whether the parent, guardian, managing conservator, and/or person responsible for the care of the child received notice of such hearing.

ANSWER. Not applicable.

i. Names of other persons present at such hearing,

ANSWER. Not applicable.

j. The date and time of entry of any order providing for the temporary care and protection of the child seized,

ANSWER. Not applicable.

k. Whether temporary managing conservator was appointed for the child seized,

ANSWER. Not applicable.

l. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state the name and address of the person so appointed, any official title, and the relationship of such person to the child,

ANSWER. Not applicable.

m. The date and manner by which the parent, managing conservator, guardian, and/or person responsible for the care of the child seized was first notified of the seizure,

ANSWER. Not applicable.

n. The date and names, if any, by which these

parents, managing conservators, guardians, and/or persons responsible for the child were first notified of the filing of such petition,

ANSWER. Not applicable.

o. Whether or not the parent, managing conservator, guardian, and/or person responsible for the care of the child was furnished a copy of the petition filed, and if so, the date on which such copy was furnished,

ANSWER. Not applicable.

p. The date and time, if any, on which the parent, managing conservator, guardian, and/or person responsible for the care of the child first afforded a hearing after filing of such petition,

ANSWER. Not applicable.

q. Whether the child seized, if any, has been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child, and, if so, the date and time of such return,

ANSWER. Not applicable.

r. Whether, if the child seized has not been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child, the parent-child relationship has been terminated or termination is presently pending.

ANSWER. Not applicable.

ARTICLE 18

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES (LEGE)

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES

NOW COMES GENE LEGE, Director of Harris County Child Welfare, Defendant in the above-styled and number cause and answers Plaintiff's Original Interrogatories as follows:

INTERROGATORY NO. 1. "State your full name and address."

ANSWERS. Eugene Lege
Office: 4040 Milam, Suite 301, Houston, Texas 77006
Home: 5035 Hollybrook, Houston, Texas 77039

INTERROGATORY NO. 2. "State the name and address of your employer on March 25, 1976."

ANSWER. I am jointly employed by the Texas Department of Public Welfare (John H. Reagan Building, Austin, Texas 78701) and the Harris County Child Welfare Board (4040 Milam, Suite 301, Houston, Texas 77006)

INTERROGATORY NO. 3. "Were you the chief administrative officer in charge of the operation of Harris County Child Welfare on March 25, 1976?"

ANSWER. Yes.

INTERROGATORY NO. 4. "If your answer to Interrogatory No. 3 is in the affirmative, was Rex Downing under your supervision and control?"

ANSWER. While as Director of Harris County Child Welfare I am ultimately responsible for the acts of all employees of the agency within the framework of their official duties, I was not the immediate supervisor of Mr. Downing on March 25, 1976. His immediate

supervisor ia Ms. Gloria Roberts, Public Welfare Supervisor; her supervisor is Ms. Linda Jones, Program Director; her supervisor is Mr. Jerry Williams, Program Director; his supervisor is Mr. Gary Booker, Assistant Director; and I am Mr. Booker's supervisor.

INTERROGATORY NO. 5. "Did you receive any communication regarding the plaintiffs on March 25, 1976? If so, please state the nature of the communication and the content."

ANSWER. No.

INTERROGATORY NO. 6. "If your answer to Interrogatory No. 5 is in the affirmative, did any person in the employ of Harris County Child Welfare take action with regard to such communication? If so, state the name of such persons and the action taken."

ANSWER. Not applicable.

INTERROGATORY NO. 7. "As a result of any communication regarding the minor plaintiffs on March 25, 1976, did any employee of the State Department of Public Welfare seize the minor plaintiffs?"

ANSWER. The minor plaintiffs were taken into possession March 25, 1976 by an employee of the State Department of Public Welfare.

INTERROGATORY NO. 8. "If your answer is in the affirmative to Interrogatory No. 7, state the location and time of the seizure and the precise ground and legal authority for picking up the minor plaintiffs."

ANSWER. The minor plaintiffs were taken into possession at the central office of Harris County Child Welfare, 4040 Milam, at approximately 5:30 PM, pursuant to Section 17.01, Texas Family Code, to protect the children from an immediate danger to their

health or physical safety.

INTERROGATORY NO. 9. "If your answer to Interrogatory No. 7 is in the affirmative please state the nature and scope of the prior investigation before the seizure was made of the minor plaintiffs."

ANSWER. Prior to taking possession of the children, Harris County Child Welfare Unit received a report that the minor child, Paul Sims, appeared to be physically abused. Harris County Child Welfare Worker, Rex Downing, then proceeded to Osborne Elementary School to investigate the complaint pursuant to Section 17.01 of the Texas Family Code. At the school, Mr. Downing interviewed the school personnel, observed the injuries to the minor plaintiff, Paul Sims, in the presence of the school personnel, and requested that the minor plaintiff, Shawana Sims, be examined by the school nurse. Following the examination of the minor plaintiff, Mr. Downing spoke by telephone with the parents of the minor plaintiffs and received their permission for the children to be taken to the Harris County Child Welfare clinic for further examination. Following the examination of the minor plaintiffs, discussion of the results of the examination with the examining physician, and consultation with administrative personnel, the children were taken into possession pursuant to Section 17.01, Texas Family Code.

INTERROGATORY NO. 10. "If your answer to Interrogatory No. 7 is in the affirmative, state whether or not the minor plaintiffs were immediately taken before a magistrate following such seizure, giving the date and time thereof."

ANSWER. A petition was filed in Juvenile Court No. 1 of Harris County on March 26, 1976, requesting that Harris County Child Welfare be appointed temporary managing conservator of minor children and

such order was entered.

INTERROGATORY NO. 11. "If your answer to Interrogatory No. 7 is in the affirmative, were the circumstances surrounding the seizure reduced to writing? If so, will you attach a copy of such written records without a Motion to Produce?"

ANSWER. Yes. No.

INTERROGATORY NO. 12. "Is Betsy C. Conner an employee of the Department? If so, please state her official capacity."

ANSWER. Betsy C. Conner is an employee of the Harris County Child Welfare Board and her official capacity is that of a court representative of the Harris County Child Welfare Unit.

INTERROGATORY NO. 13. "If your answer to Interrogatory No. 7 is in the affirmative, where were the minor plaintiffs taken after they were seized?"

ANSWER. They were taken to the Rosaline Thomas Foster Home. This is a foster home licensed by the Texas Department of Public Welfare.

INTERROGATORY NO. 14. "For what period of time did the minor plaintiffs remain at the location given as your answer to Interrogatory No. 13?"

ANSWER. The minor plaintiffs, Sabrina and Shawana, remained at the foster home until April 6, 1976, at which time they were placed with their maternal grandparents. (Mr. and Mrs. James Carter, 992 Majorie, Houston). The minor plaintiff, Paul, remained in the foster home until May 5, 1976, when the child was returned to his parents pursuant to the order entered in this cause by the Honorable John L. Singleton.

INTERROGATORY NO. 15. "Were the minor plaintiffs examined by a medical doctor during the time given as your answer to Interrogatory No. 14?"

ANSWER. On March 27, 1976, the minor plaintiff, Paul Sims, was examined by Dr. Jesus Diaz and following such examination he was hospitalized at St. Joseph's Hospital until April 7, 1976. He was also seen by a specialist consultant, Dr. Robert F. Austin.

INTERROGATORY NO. 16. "If your answer to Interrogatory 15 is in the affirmative, state:

a. The name and business address of such doctor,

ANSWER. Dr. Jesus Diaz, St. Joseph's Professional Bldg., 2000 Crawford and Dr. Robert F. Austin, St. Joseph's Prof. Bldg., 2000 Crawford.

b. The official capacity of such doctor with respect to the Harris County Child Welfare Unit,

ANSWER. None.

c. Whether or not such doctor had a written consent for such examination from adult plaintiffs at the time of such examination,

ANSWER. No.

INTERROGATORY NO. 17. "On March 25, 1976, did the records of Harris County Child Welfare Unit contain medical histories of the minor plaintiffs, Paul or Shawana Sims?"

ANSWER. Yes.

INTERROGATORY NO. 18. "Had Harris County Child Welfare had prior transactions with respect to the minor plaintiffs, Paul and Shawana Sims, during the course of which records were developed? If so, please

state the nature of such transactions."

ANSWER. The minor plaintiff, Paul Sims, was placed in a Harris County Child Welfare foster home on January 26, 1968. On June 16, 1971, the parental rights of the natural parents were terminated and the child was placed in the custody of Harris County Child Welfare for purposes of placing the child for adoption. On December 10, 1973, Harris County Child Welfare placed the child with John and Mary Sims for purposes of adoption.

The minor plaintiff, Shawana Sims, was placed in a Harris County Child Welfare foster home on June 10, 1973. On July 22, 1974, the parental rights of the natural parents of the child were terminated and Harris County Child Welfare was appointed managing conservatorship for purposes of placing the child for adoption. On August 16, 1974, Harris County Child Welfare placed the child with John and Mary Sims for purposes of Adoption.

INTERROGATORY NO. 19. "If your answer to Interrogatories No. 17 and 18 is in the affirmative, were such records furnished the examining doctor named in Interrogatory No. 16?"

ANSWER. The examining physician only had access to the medical records at the time of examining the children.

INTERROGATORY NO. 20. "State the length of time between the time of the seizure of the minor plaintiffs and the time of filing any legal action.

ANSWER. The children were taken into possession at approximately 5:30 PM on March 25, 1976, and A Suit for Protection of a Child in an Emergency was filed at 4:54 PM, on March 26, 1976.

INTERROGATORY NO. 21. "State the date and time when a legal relationship was first established between you or your department and the minor plaintiffs and the nature of such legal relationship."

ANSWER. At approximately 5:30 PM, on March 25, 1976, Harris County Child Welfare Unit took possession of the children to protect them from immediate danger pursuant to Section 17.01 of the Texas Family Code.

INTERROGATORY NO. 22. "On March 25, 1976, did the adult plaintiffs make requests of the Department for examination of the minor plaintiffs by a doctor of their choice? If so, was such request granted?"

ANSWER. Yes. No.

INTERROGATORY NO. 23. "Did the Department make the minor plaintiffs available for examination by Dr. Eula Fay Perry on Saturday, April 3, 1976?"

ANSWER. No.

INTERROGATORY NO. 24. "If your answer to Interrogatory No. 23 is in the negative, when did the Department first make the children available?"

ANSWER. The minor plaintiffs, Shawana and Sabrina were made available on March 31, 1976, for examination at the 4040 Milam Office by a physician of their choice. The minor plaintiff, Paul, was hospitalized at St. Joseph's Hospital from March 27, 1976 until April 7, 1976.

INTERROGATORY NO. 25. "State where each of the minor plaintiffs spent the night of March 25, 1976, and on whose authority."

ANSWER. The children were in a Texas Department of Public Welfare licensed foster home at

4134 Clover, Houston, Texas, placed on the authority of Harris County Child Welfare pursuant to Section 17.01 of the Texas Family Code.

INTERROGATORY NO. 26. "State the whereabouts of each of the minor plaintiffs from the night of March 25, 1976 through the night of April 4, 1976 giving the exact locations and names of parties responsible for each of the minor plaintiffs."

ANSWER. The minor plaintiff, Paul, spent March 26 and 27, in the Rosaline Thomas Foster Home (4134 Clover, Houston, Tx.) in the care of the foster parents. The minor plaintiff, Paul, spent March 27 through April 7, 1976, in St. Joseph's Hospital under the care of Dr. Jesus Diaz. The minor plaintiffs, Sabrina and Shawana, spent March 25 until April 4, 1976, at the aforesaid foster home under the care of the foster parents.

INTERROGATORY NO. 27. "State as to the minor plaintiffs, Sabrina and Shawana, did the Department arrange to have them attend school during their detention by the Department?"

ANSWER. Yes.

INTERROGATORY NO. 28. "If your answer to Interrogatory No. 27 is in the affirmative, please state where and when the two minor plaintiffs attended school. Please state the dates the minor plaintiffs were absent from school.

ANSWER. Sabrina and Shawana Sims were absent from school on March 26, 29, 30, 31, April 1, 2, 5, and 6. They resumed classes at Osborne Elementary on April 7, 1976, and attended regularly after that date under the supervision of their grandparents, Mr. and Mrs. James Carter.

INTERROGATORY NO. 29. "If any of the minor plaintiffs were caused to attend school other than where they were enrolled, state the name of the minor plaintiff and the reason therefore (sic)."

ANSWER. On April 12, 1976, the minor plaintiff, Paul, was enrolled in Sunnyside Elementary School and attended this school unitl May 5, 1976, when he ordered to be returned to his parents by the Honorable John L. Singleton. The child attended Sunnyside Elementary School, as the foster home was in the geographic area for that school.

INTERROGATORY NO. 30. "For the period of March 25, 1976 to May 5, 1976, state the dates and locations set by the Department for visitation between the adult and minor plaintiffs."

ANSWER. Mr. and Mrs. Sims visited Paul, Shawana, and Sabrina Sims at St. Joseph's Hospital on March 31, 1976. Mr. and Mrs. Sims visited Paul several times while Paul was in the hospital.

When Paul was released from St. Joseph's Hospital he stated that he wanted to return to the foster home where he had been previously. Visitation was arranged for Sabrina and Shawana to see their parents twice per week. Mr. James Carter felt visits should be supervised by him and limited to two or three per week. Visits were made at the convenience of Mr. and Mrs. Carter and Mr. and Mrs. Sims.

INTERROGATORY NO. 31. "From the date on which any legal relationship was established between you and the minor plaintiffs up to May 6, 1976, were you served with any process at the instance of the adult plaintiffs whereby they sought return of the minor plaintiffs? Was any person in the Department served with such process?"

ANSWER. Yes.

INTERROGATORY NO. 32. "If your answer to Interrogatory No. 31 is in the affirmative, state the nature of such process."

ANSWER. Yes, I was so served. I was served with a Writ of Habeas Corpus on April 2, 1976, such Writ to be heard in Juvenile Court No. 1. I was also served with Plaintiff's Application for a Preliminary Injunction on April 29, 1976, such Application to be heard in the United States District Court for the Southern District of Texas.

INTERROGATORY NO. 33. "From March 25, 1976, to May 5, 1976, did counsel for the adult plaintiffs request that the Department furnish a letter stating the Department had the minor plaintiffs in their possession and control?"

ANSWER. Yes.

INTERROGATORY NO. 34. "If your answer to Interrogatory is in the affirmative, did the Department furnish such letter?"

ANSWER. No.

INTERROGATORY NO. 35. "Did you file or cause to be filed any formal or informal motion seeking transfer of any pending litigation regarding the minor plaintiffs from courts of Harris County, Texas to the courts of Montgomery County, Texas?"

ANSWER. No.

INTERROGATORY NO. 36. "Does the Harris County Child Welfare Unit transmit reports of child abuse registered pursuant to 34.06, Title 2, Texas Family Code?"

ANSWER. Yes.

INTERROGATORY NO. 37. "Have you placed or caused to be placed the name or names of any of the plaintiffs in any central file or register of child abusers?"

ANSWER. Yes.

INTERROGATORY NO. 38. "If your answer to Interrogatory No. 37 is in the affirmative,

a. State the Date or dates when plaintiffs names were placed in such file or register,

ANSWER. CANRIS report is attached.

b. State the exact information transmitted."

ANSWER. See answer to Interrogatory No. 38(a).

INTERROGATORY NO. 39. "From and after 9:00 AM on May 5, 1976, through May 14, 1976, did you or any person at Harris County Child Welfare Unit or your attorneys transfer information developed regarding any of the plaintiffs to the Montgomery County, Texas Welfare Department?"

ANSWER. Yes.

INTERROGATORY NO. 40. "If your answer to Interrogatory No. 39 is in the affirmative, was such information oral, written, or both? State the purpose of such transfer of information, if any."

ANSWER. Yes, both. The purpose of such transfer of information was to report the circumstances of the children to the Texas State Department of Public Welfare protective service staff assigned to Montgomery County as well as the Montgomery County Juvenile Probation Department so that the children would receive protective services in Montgomery County.

INTERROGATORY NO. 41. "Does the Harris County Child Welfare Unit have written guidelines for the selection of foster parents? If so, will you without a Motion to Produce attach a copy of such written guidelines?"

ANSWER. Yes. (A copy of the guidelines is attached)

INTERROGATORY NO. 42. "Does the Department have a regular schedule by which foster homes are re-evaluated?"

ANSWER. Yes.

INTERROGATORY NO. 43. "If your answer to Interrogatory No. 42 is in the affirmative, when was such a re-evaluation conducted as to the homes in which the minor plaintiffs were placed?"

ANSWER. Children have been placed in the Rosaline Thomas Foster Home for varying times from 1968 to present. Foster children have been in this home most of this period of time. It was first licensed on February 29, 1968 and revalidated yearly.

INTERROGATORY NO. 44. "State the names of each employee, agent, or consultant, of Harris County Child Welfare who worked with the adult or minor plaintiffs."

ANSWER. Doctors Blair and Rita Justice, Comprehensive Services for Education; Rex Downing, Public Welfare Worker; Gloria Roberts, Public Welfare Supervisor; Linda Jones, Program Director; Jerre Williams, Program Director; Dr. Marie Surgi; Betsy Conner, Court Representative; Dr. Jesus Diaz; and Dr. Robert Austin.

INTERROGATORY NO. 45. "Did the Department suggest that the adult plaintiffs submit to counseling?"

ANSWER. Yes.

INTERROGATORY NO 46. "Did the adult plaintiffs attend counseling as suggested by the Department?"

ANSWER. Yes.

INTERROGATORY NO. 47. "If your answer to Interrogatory No. 46 is in the affirmative, was the choice of counselors made by Harris County Child Welfare or by John and Mary Sims?"

ANSWER. John and Mary Sims.

INTERROGATORY NO. 48. "If the adult plaintiffs attended counseling, state the name and address of each counseling agency or consultant where to your knowledge they attended counseling."

ANSWER. Blair and Rita Justice
University of Texas
School of Public Health
Houston, Texas 77025

INTERROGATORY NO. 49. "If your answer to Interrogatory No. 46 is in the affirmative were any written or oral reports made to Harris County Child Welfare Unit? If so, will you produce any such written or oral reports without a Motion to Produce?"

ANSWER. Oral reports were made to Harris County Child Welfare. No.

INTERROGATORY NO. 50. "Who is responsible to pay for any charges incurred for counseling of John or Mary Sims? What total amount has been incurred therefor on the date of your answer to these interrogatories?"

ANSWER. John and Mary Sims are responsible for

the costs, and the total amount of costs incurred is not a matter within my knowledge.

INTERROGATORY NO. 51. "Who is responsible to pay for any charges incurred for foster home care of the minor plaintiffs for the period March 25, 1976 to May 5, 1976? What is the total amount that was incurred for such care?"

ANSWER. Harris County Child Welfare Unit is responsible. The total amount of charged incurred for such care was $246.16.

INTERROGATORY NO. 52. "Prior to March 25, 1976, did Harris County Child Welfare Unit consent to adoption of any children by the adult plaintiffs John and Mary Sims?"

ANSWER. Yes.

INTERROGATORY NO. 53. "If your answer to Interrogatory No. 52 is in the affirmative, did the records of Harris County Child Welfare Unit on March 25, 1976 contain any information made in relation to the adoption studies?"

ANSWER. Yes.

INTERROGATORY NO. 54. "If your answer to Interrogatory No. 53 is in the affirmative will you produce such records without a Motion to Produce?"

ANSWER. No.

INTERROGATORY NO. 55. "Do you have any photographs of the minor plaintiffs made on March 25, 1976? If so, will you produce such photos without a Motion to Produce?

ANSWER. Yes. Attached are photographs taken of Paul Sims on March 25, 1976. Also attached are photographs of Paul Sims taken on March 27, 1976.

INTERROGATORY NO. 56. "If your answer to Interrogatory No. 55 is in the affirmative who made such photographs?"

ANSWER. Mr. Rex Downing, Public Welfare Worker made the photographs on March 25, 1976. Officer R.G. Hickman of the Houston Police Department made the photographs on March 27, 1976.

INTERROGATORY NO. 57. "Does Marie L. Surgi perform services for Harris County Child Welfare? If so, please state how long she has performed such services, her relationship with Harris County Child Welfare, and her compensation."

ANSWER. Yes. Since July 1, 1972, Dr. Surgi has acted as a consultant to the agency in matters concerning the health of children to whom the agency is providing protective services. Dr. Surgi is paid by contract for three quarters time at the rate of $32,400 per year.

INTERROGATORY NO. 58. "For the period beginning September 1, 1975 through May 31, 1976, state the total number of reports received by the Montgomery County Welfare Department under color of provision of §34.01, §34.02, Title 2, Texas Family Code, if any."

ANSWER. Assuming the interrogatory refers to Harris County Child Welfare Unit rather than Montgomery County Welfare Department, from September 1, 1975, until May 31, 1976, Harris County Child Welfare Unit received 8,820 reports pursuant to the provisions of Sections 34.01 and 34.02, Texas Family Code.

INTERROGATORY NO. 59. "For the total number, if any, given in your answer to Interrogatory No. 58, state separately as to each such report,

a. The date and time of receipt of such report,

ANSWER. Assuming the interrogatory refers to Harris County Child Welfare Unit rather than Montgomery County Welfare Department, separate statements to provide the detailed information requested in Interrogatory 59 (a) through 59 (m) would require a minimum average of one hour per report for a professional staff person. Based on the number of reports received, the information requested in Interrogatory 59 (a) through 59 (m) would require an estimated 8,820 hours for compilation.

b. Whether such report was oral or in writing,

ANSWER. See answer to Interrogatory 59(a).

c. Whether such report was from an indentified source or from an anonymous source,

ANSWER. See answer to Interrogatory 59(a).

d. If same was an oral report, state whether it was made by telephone,

ANSWER. See answer to Interrogatory No. 59(a).

e. Whether any information received as a result of such report was placed in the "Central Registry" provided for by §34.06, Title 2, Texas Family Code,

ANSWER. See answer to Interrogatory No. 59(a).

f. The date on which such information was placed in such Central Registry,

ANSWER. See answer to Interrogatory No. 59(a).

f. If any such information was placed in a central registry,

ANSWER. See answer to Interrogatory No. 59(a).

g. If any such information was placed in a central registry, state whether it has been disseminated to other registries,

ANSWER. See answer to Interrogatory No. 59(a).

h. Whether any children were seized as a result of such report,

ANSWER. See answer to Interrogatory No. 59(a).

i. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state the date and time of such seizure,

ANSWER. See answer to Interrogatory No. 59(a).

j. Whether any suit was thereafter filed by the Montgomery Coundy (sic) Welfare Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of such report,

ANSWER. See answer to Interrogatory No. 59(a).

k. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state whether the State Department sought termination of the parent-child relationship in such suit,

ANSWER. See answer to Interrogatory No. 59(a).

l. Whether any suit is pending, concluded by final trial or dismissed if such suit was filed by the Montgomery County Welfare Department under color of any provisions of Chapter 17 or Chapter 11, Title 2, Texas Family Code, as a result of any report,

ANSWER. See answer to Interrogatory No. 59(a).

m. If your answer to the immediately preceding interrogatory is "concluded by final trial" state whether or not same resulted in termination of the parent-child relationship."

ANSWER. See answer to Interrogatory No. 59(a).

INTERROGATORY NO. 60. "For the period September 1, 1975 through May 31, 1976, state the total number of petitions filed by the Montgomery County Welfare Department under color of provisions of §17.01 and §17.02, Title 2, Texas Family Code, if any.

ANSWER. Assuming the interrogatory refers to Harris County Child Welfare Unit rather than Montgomery County Welfare Department, from September 1, 1975, until May 31, 1976, Harris County Child Welfare Unit filed 326 petitions pursuant to Sections 17.01 and 17.02, Texas Family Code.

INTERROGATORY NO. 61. "For the total number, if any, given as your answer to Interrogatory No. 18, state separately as to each such petitions filed,

a. The number of children seized,

ANSWER. Assuming that the interrogatory refers to Harris County Child Welfare Unit rather than Montgomery County Welfare Department, the number of children taken into possession pursuant to Sections 17.01 and 17.02, Texas Family Code, was 479.

b. The date and time of seizure,

ANSWER. Assuming that the interrogatory refers to Harris County Child Welfare Unit rather than Montgomery County Welfare Department, separate statements to provide the detailed information requested in Interrogatory 61 (b) through 61 (r) would require a minimum average of one hour per report for a professional staff person. Based on the number of petitions filed, the information requested in Interrogatory 61 (b) through 61 (r) would require an estimated 479 hours of compilation.

c. The date and time of filing of such petition,

ANSWER. See answer to Interrogatory No. 61(b).

d. Whether counsel was appointed for the minors seized, and if so, give the name and address and date of appointment of counsel,

ANSWER. See answer to Interrogatory No. 61(b).

e. The names and locations of the court in which such petitions were filed and the cause number under which such petition was docketed,

ANSWER. See answer to Interrogatory No. 61(b).

f. The date and time the child was first delivered to the court following seizure,

ANSWER. See answer to Interrogatory No. 61(b).

g. The date, time and place of the hearing held providing for temporary care and protection of the child seized,

ANSWER. See answer to Interrogatory No. 61 (b).

h. Whether the parent, guardian, managing conservator, and/or person responsible for the care of the child received notice of such hearing,

ANSWER. See answer to Interrogatory 61(b).

i. Names of other persons present at such hearing,

ANSWER. See answer to Interrogatory No. 61 (b).

j. The date and time of entry of any order providing for the temporary care and protection of the child seized,

ANSWER. See answer to Interrogatory No. 61 (b).

k. Whether temporary managing conservator was appointed for the child seized,

ANSWER. See answer to Interrogatory No. 61 (b).

l. If your answer to the immediately preceding sub-interrogatory is in the affirmative, state the name and address of the person so appointed, any official title, and the relationship of such person to the child,

ANSWER. See the answer to Interrogatory 61 (b).

m. The date and manner by which the parent, managing conservator, guardian, and/or person responsible for the care of the seized child was first notified of the seizure,

ANSWER. See answer to Interrogatory No. 61 (b).

n. The date and names, if any, by which these parents, managing conservators, guardians, and/or persons responsible for the child were first notified of the filing of such petition,

ANSWER. See answer to Interrogatory No. 61 (b).

o. Whether or not the parent, managing conservator, guardian, and/or person responsible for the care of the child was furnished a copy of the petition filed, and if so, the date on which such copy was furnished,

ANSWER. See answer to Interrogatory No. 61 (b).

p. The date and time, if any, on which the parent, managing conservator, guardian, and/or person responsible for the care of the child was first afforded a hearing after filing of such petition,

ANSWER. See answer to Interrogatory No. 61 (b).

q. Whether the child seized, if any, has been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child and, if so, the date and time of such return,

ANSWER. See answer to Interrogatory No. 61(b).

r. Whether, if the child seized has not been returned to the possession of the parent, managing conservator, guardian, and/or person responsible for the care of the child, the parent-child relationship has been terminated or termination is presently pending.

ANSWER. See answer to Interrogatory No. 61 (b).

ARTICLE 19

DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES (SURGI)

ARTICLE 19, DEFENDANT'S ANSWERS TO PLAINTIFF'S ORIGINAL INTERROGATORIES

NOW COMES MARIE SURGI, M.D., Defendant in the above-styled and numbered cause and answers Plaintiff's Original Interrogatories as follows:

INTERROGATORY NO. 1. "State your full name and address."

ANSWER. MARIE LOUISE SURGI, M.D.
1907 WYNDALE
HOUSTON, TEXAS 77030 (home)

4040 MILAM
HOUSTON, TEXAS 77006 (office)

INTERROGATORY NO. 2. "Do you have a private practice of medicine? If so, what is your office address?"

ANSWER. No.

INTERROGATORY NO. 3. "Do you perform services as a medical doctor for Harris County Child Welfare? If so, what are the terms under which you perform such services?"

ANSWER. I see all the children who come into the custody of Harris County Child Welfare at intake, to determine and evaluate the health status of the child and make recommendations for medical referrals and future follow-up care. I also see children of families with whom our family service unit is working to determine health status and need for referral or follow-up care or need of definitive counseling. (I am paid by contract for three-quarters time at the rate of $32,400 per year).

INTERROGATORY NO. 4. "Are you paid for your services by Harris County Child Welfare?"

ANSWER. Yes. See answer to Interrogatory No. 3.

INTERROGATORY NO. 5. "Do you have any areas of specialization in the practice of medicine? If so, what are those areas of specialization?"

ANSWER. I have been a Pediatrician for 34 years. For 18 years I have had a private Pediatric practice. I have been employed as a Pediatrician in Public Health for 10 years, and for 4 years I have worked for Harris County Child Welfare.

INTERROGATORY NO. 6. "Were you directed to examine minor plaintiffs by an employee of the State Department of Public Welfare on March 25, 1976?"

ANSWER. Yes, I was asked to examine the three Sims children by Mr. Rex Downing on March 25, 1976.

INTERROGATORY NO. 7. "If your answer to Interrogatory No. 6 is in the affirmative, did you prepare written reports covering such examination? If so, did you attach to your report what you refer to as 'abuse sheets'?"

ANSWER. I did prepare written reports and did attach 'abuse sheets'.

INTERROGATORY NO. 8. "If your answer to Interrogatory No. 7 is in the affirmative, why did you denote such reports as 'abuse sheets' rather than 'injury reports' or by some other designation?"

ANSWER. The sheets referred to as 'abuse sheets' are 2 sheets, one depicting the anterior form of a child and the other depicting the posterior form of a child. The sheet bears no caption. The sheets enable me to record lesions of the skin whether these are due to physical trauma or natural causes. The physical trauma may be due to accident or may be deliberately caused most often punitively. In this case the sheets were referred to as 'abuse sheets' since they record severe lesions due to

physical discipline. There are several lesions on the sheets attributed to accidental trauma and these are so designated.

(Abuse is defined in my medical dictionary as misuse, wrong use, especially excessive use, of anything. Webster's defines abuse as ill-treatment, the excessive or injudicious use of anything; insult; violation.)

(Child Abuse as defined in Henry Kempe's book on *Helping the Battered Child and his Family* is defined as any non-accidental act of omission of a parent or legal custodian resulting in physical or emotional injury to a child. For legal purposes the term "child abuse" has usually been reserved for cases involving serious physical injuries. I consider Paul's injuries serious.)

INTERROGATORY NO. 9. "What is the basis for your statement on your report dated March 25, 1976, as to the minor plaintiff Shawana Sims that 'parents need counseling in child discipline?' "

ANSWER. Since Shawana showed evidence of recent trauma due to being paddled and in the light of Paul's more serious trauma, I felt the parent-child relation would benefit from proper counseling and the learning of other ways to cope with discipline besides severe physical punishment.

INTERROGATORY NO. 10. "How did you conclude that Paul Edward Sims was an 'abused child' as stated on your report of March 25, 1976?"

ANSWER. Paul showed extensive bruising and deep and tender areas over both buttocks-anterior and posterior thighs and posterior legs. There were open bleeding lesions on each buttock. (See photographs attached of Paul Sims taken at time of my examination. Plaintiffs may refer to photographs included with Defendant's Proposed Stipulations.) Reference should

also be made to photographs attached to Defendant Gene Lege's Answer to Interrogatory No. 55.

INTERROGATORY NO. 11. "What is the meaning of the statement on your report of March 25, 1976, on Paul Sims that 'one can envision a pattern to the rotation of sites?' "

ANSWER. I was told in the history given by the parents that "spanking was alternated because if he was spanked in the same area more than once, he would blister." The mother confirmed this in the examination room, and seeing the number of places in which Paul was spanked (buttocks-anterior, thighs, posterior thighs-posterior calves) made it easy to envision such a rotation.

INTERROGATORY NO. 12. "Did you have written consent from the parents authorizing your examination of the minor plaintiffs on March 25, 1976?"

ANSWER. No.

INTERROGATORY NO. 13. "State the normal size of the vaginal opening of a female, age eight years."

ANSWER. In my experience a vaginal opening in an 8 year old child is usually less than 2/3 inches diameter. An enlarged opening may be due to trauma or self-fingering or exploration. It is possible that a child who is physically mature at an early age may have a larger opening. I also see children who have been sexually molested. In recording physical findings, I make note of the enlargement without any allegations as to the cause.

INTERROGATORY NO. 14. "With respect to your report on Sabrina Sims on March 25 that the child had an 'Enlarged vaginal opening (2/3 in diameter)' that the 'child said she knew it but denied anyone did it or that she,' what question did you ask that illicited this response from the child?"

ANSWER. I probably told the child she was sort of large "down here." "Has anything happened to hurt you?" Her answer came as a surprise. I frequently ask children if they scratch and touch themselves in this area. She said she didn't. I did not pursue this since I had no reason to, and I certainly do not ask children of this age explicit questions about sexual molestation unless I have a definite history of such molestation.

INTERROGATORY NO. 15. "To what did you refer in your report on Paul Sims of March 25, 1976, by the statement 'get old history?' "

ANSWER. I suggested getting "old history" on Paul because his parents claimed he had a blood defect that caused him to bleed and bruise easily and they claimed they were told that at the time of the adoption. Since Paul was so bruised, I felt it was imperative to know if he had a blood dyscrasia.

INTERROGATORY NO. 16. "Did you examine the minor plaintiff Paul or Shawana Sims prior to March 25, 1976?"

ANSWER. I saw and examined Shawana at intake into the agency on 6-14-73 and again on 6-29-73 when she came back for laboratory screening. I saw and examined Paul on 2-8-73 when he was screened in our laboratory.

INTERROGATORY NO. 18. "If your answer to Interrogatory No. 17 is in the affirmative, did you refer to records of any such prior examinations?"

ANSWER. Yes, if you mean question 16 and referring to dates listed in 17.

ARTICLE 20

ORDER OF DISMISSAL OF DEFENDANT, ERNEST COKER, SR.

ARTICLE 20, ORDER OF DISMISSAL OF DEFENDANT, ERNEST COKER, SR.

The Court having considered the motion of the Defendant, Ernest Coker, Sr., by and through John L. Hill, Attorney General of Texas, to dismiss this cause as to said defendant, and the Court having considered the pleadings herein, and having been advised in open court of the agreement of the Plaintiffs to said motion,

It is hereby ORDERED that this cause is hereby dismissed as to the Defendant, Ernest Coker, Sr.

Done this 16th day of August, 1976, at Houston, Harris County, Texas.

ARTICLE 21

ORDER OF DISMISSAL OF DEFENDANT ROBERT L. LOWRY

ARTICLE 21, ORDER OF DISMISSAL OF DEFENDANT ROBERT L. LOWRY

At a hearing before the Court on August 4, 1976, Counsel acting on the behalf of defendant Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas, orally moved the Court to rule upon the Rule 12 Motion to Dismiss for Failure to State a Cause of Action that had been filed with the Court previously on behalf of said defendant. Counsel for plaintiffs orally stated to the Court that plaintiffs did not oppose the Motion or the dismissal of Judge Lowry from the suit. The Court having considered the pleadings on file and having heard the argument of Counsel thereon is of the opinion that the Motion to Dismiss should be granted. It is accordingly

ORDERED by the Court that this cause is dismissed as to defendant Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas, as of this 15th October, 1976, at Houston, Texas.

ARTICLE 22

MOTION FOR CONSOLIDATION OF ACTIONS

ARTICLE 22, MOTION FOR CONSOLIDATION OF ACTIONS

Now comes Plaintiffs in Civil Action Number 76-H-1120, entitled WOODS et al v. State Department of Public Welfare et al, and moves the Court for consolidation with the Civil Action now pending before this Court entitled SIMS et al v. Texas Department of Public Welfare, et al, and would further show the Court as follows:

1. That the two Actions have the following similar features:

a. There are common defendants in both cases,

b. In each case the constitutionality of inter-relating portions of Title 2, Texas Family Code is challenged,

c. In each case injunctive and declaratory relief is sought,

d. In each case the convening of a three judge panel is requested,

e. In each case the proof or evidence will be the same or similar,

f. In each case the pattern and practice of defendants actions are the same or similar.

2. Consolidation:

a. Would facilitate the business of this Court,

b. Would facilitate the orderly and speedy administration of justice,

c. Would enable all parties to avoid unnecessary duplication of cost, expenses, and time in the litigation of the controversies,

d. Would not in any way prejudice the defendants, but would instead enhence (sic) their ability to defend two Actions in one hearing.

3. This Court could, therefore, pass on the issues of the above Actions in one hearing and thereby promote the convenient administration of Justice.

4. Consolidation is permitted under Rule 42(a) Federal Rules of Civil Procedure.

5. That one of the above Actions is a Class Action and that Class Action has not yet been certified. That this, however, should not be an obstacle to consolidation, for it is well settled that before a class is certified it may be assumed to be a proper class and proceedings conducted according (sic). *Leisner v. N.Y. Tel. Co.*, S.D. N.Y. 1973) 358 F Supp. 359. *City of Inglewood v. City of Los Angeles*, (Ca 9th 1971) 451 F Zd (sic) 948.

6. That even assuming that the class is not ultimately certified, the Actions can still be consolidated as individual actions without the class feature.

7. That consolidation has been ordered in other cases even prior to there (sic) having been an answer filed if it is clear that common questions are involved. *Shultz v. Mfg'rs & Traders Trust Co.*, 29 F Supp. 37 (WD N.Y. 1939).

8. The Federal Courts have stated that even if one of the claims proposed to be consolidated is alleged to be frivulous (sic) is no reason to deny consolidation. This not to suggest, of course, that either of the two Actions here involved is frivulous (sic). *Kuerschner & Rauchwarenfabuk, A.G. v. N.Y. Trust Co.*, (S.D. N.Y. 1956) 22 F R Serv. 42 a. 4, Case 2.

9. The Federal Courts have also held that consolidation would be in order even if the two cases are

proceeding under different theories of relief.

10. Furthermore, there would be a better clarafication (sic) of the issues when the two cases are before a single three judge panal (sic) because of the interrelating character of the statutes being challenged. Each Action, on its own, cannot show the full gravaman (sic) and impact of the statutory scheme and thus consolidation would aid in this regard.

11. Consolidation should be encouraged and allowed whenever reasonable and in particular where, as here, there are Actions against common defendants to redress a common wrong, and where there are a substantial number of common issues of fact and law. *Altala Hydratane Gas Inc. v. Lowry Zims Co.*, (N D Miss. 1966) 41 FRD 164.

12. An analogous case is *Citizens Committee v. Volpe*, (SD N.Y. 1969) 297 F Supp. 804, where two cases seeking to bar construction of an expressway were ordered consolidated.

13. An even closer case to the cases at bar is *Miranda v. Nelson*, (D Ariz. 1972) 351 F Supp. 735 aff'd (1973) 413 U.S. 902, where two cases challenging State Constitutional and statutory provisions relative to alienage were consolidated over State objections.

14. And yet a closer case is *United States v. Chicago*, (N D Ill. 1974) 385 F Supp. 540, where three Actions proceeding under 42 USC 1983 alleging, as in the case at bar, deprivations of civil rights were consolidated. There the Court stated that the fact that the Actions were not at the same stage of discovery, or that they were proceeding under different theories of relief was not fatal to consolidation.

WHEREFORE, Plaintiffs request and pray the Court to consolidate Civil Actions Nos. 76-H-665 and 76-H-1120 for the reasons hereinabove stated.

ARTICLE 23

PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO STAY

ARTICLE 23, PLAINTIFF'S RESPONSE AND OBJECTION TO DEFENDANT'S MOTION TO STAY

TO THE HONORABLE JUDGES OF SAID COURT:

Now comes JOHN PLEASANT SIMS, ET AL., Plaintiff in the above styled and numbered cause and respectfully files this Response and Objection To Defendant's Motion To Stay injunction pending appeal and for cause would show the Court the following:

I.

That this District Court should not have obstained (sic) as obstention (sic) was not warranted and would be improper under this unique and compelling circumstances of this cause.

II.

That to stay this Court's order prohibiting the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for by Title 2 section 34.06 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports would not cause Defendants irreparable harm, however, Plaintiffs would suffer irreparable harm as to the method authorized and utilized by said section, in so far as information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without judicial determination of abuse and or neglect. In addition, the public interest would be best served by denial of Defendants' Motion To Stay pending appeal.

III.

That the application of this Court's standard of clear and convincing evidence rather than the standard set forth in Title 1, Section 11.15 of the Texas Family Code

would not cause Defendants' irreparable harm nor would such standard place an improper and excessive burden on the state when it institutes proceedings to protect children from abuse and neglect. Further that Plaintiffs and the public interest would be best served by application of this Court's standard.

IV.

That to require the appointment of an attorney ad litem for the child within the 24 hour exparte (sic) hearing in all suits affecting the parent-child relationship in which the state is a party, would not be impossible.

V.

That to require notice and a hearing to parents prior to actions authorized by Title 2, section 34.05(c) of the Texas Family Code would not dangerously delay treatment to children in need of medical attention.

VI.

Further that a granting of any portion of Defendants' Motion To Stay would cause Plaintiff's irreparable harm and would not be in the best interest of the public as the appeal process is lengthy and many of the grounds upon which Defendants' appeal would be based as stated by them in their Motion To Stay are without merit.

WHEREFORE PREMISES CONSIDERED, Plaintiff prays that Defendants' Motion To Stay be denied and for such or (sic) relief to which they are entitled.

Supreme Court, U. S.
FILED
DEC 18 1978
MICHAEL RODAK, JR., CLERK

VOLUME III

APPENDIX

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,

v.

JOHN PLEASANT SIMS, ET AL.

* * *

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT FILED JULY 3, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

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ARTICLE 24

PRETRIAL ORDER

PRETRIAL ORDER

STATEMENT OF THE CASE

Plaintiff's Statement of the Case:

This Civil Action is a challenge to the constitutionality both on their face and as applied to Plaintiffs, of portions of Chapters 11, 14, 15, 17, 34 and 35, TITLE 2, TEXAS FAMILY CODE.

Plaintiffs have been irreparably injured by the acts of the Defendants; said acts resulting in deprivation of Plaintiff's rights, privileges, liberties and immunities secured to them by the Constitution of the United States, while acting under color of such State Statutes and by use of standards and procedures which are violative of Article I, Section 9 of and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States for which deprivations Plaintiffs here seek redress.

Plaintiffs seek a Declaratory Judgment declaring certain statutes of the State of Texas contained in TITLE 2, TEXAS FAMILY CODE repugnant to the Constitution of the United States, null and void on their face, and also as applied to Plaintiffs. Plaintiffs further request this Court to permanently RESTRAIN and ENJOIN operation, enforcement and implementation of such State statutes and rules, regulations and policies made pursuant and incident thereto.

Plaintiffs seek monetary damages.

Defendants' Statement of the Case:

On March 25, 1976, the State Department of Public Welfare received a report of physical abuse to Paul Sims, an eight year old student at an elementary school in Houston, Texas. Rex Downing, a welfare case worker, was assigned to go to the school in order to investigate.

He was advised that the child had received a spanking from his father, John P. Sims, earlier in the day. Following an examination of Paul's injuries, which included bleeding from both buttocks, Downing arranged to have the boy and his sisters, who attended the school, examined by a doctor at the Harris County Child Welfare Unit.

After examination, the physician, Dr. Marie Surgi, concluded that Paul Sims was a very badly bruised and abused child. His buttocks were found to have ulcerated skin in the center oozing blood. He had numerous bruises on other parts of his body. His sisters were also found to have bruises to a lesser extent.

In conversation, it was determined that Mrs. Sims had administered physical discipline to Paul the night before, on March 24, 1976. Teachers testified to the beating at school on March 25.

The Harris County Child Welfare Unit decided to take possession of the children in this emergency situation in order to protect them from danger to their health and physical safety. (Chapter 17, Texas Family Code, Sec. 17.01). This was accomplished by placing the children in a foster home until further investigation could be conducted.

The Harris County Child Welfare Unit then proceeded to file a Suit for Protection of Child in Emergency. This was done without notice to the parents, pursuant to Section 17.03 of the code. The suit asked that Gene Lege, Director, Harris County Child Welfare Unit be appointed temporary managing conservator of the Sims children, pending further investigation. This suit was filed on March 26, 1976, and a temporary order was issued on that day. All of this was done pursuant to Chapter 17, of the Family Code which authorizes such temporary orders for a period not to exceed ten days.

On March 26, 1976, the Sims retained an attorney, Gladys Goffney, to represent them in the proceedings regarding their children.

On March 31, 1976, Mrs. Goffney submitted a Motion To Modify the emergency order previously granted pursuant to Chapter 17 of the Family Code. Section 17.06 makes it mandatory upon the Court to conduct a hearing, if a parent, after notice to those involved in the original hearing, seeks to modify an emergency order granted under Chapter 17. For some reason, not satisfactorily explained, the clerk failed to accept and schedule the motion, and the attorney for the plaintiffs did not insist upon its being filed. Neither did the attorney for the plaintiffs seek a writ of mandamus requiring the clerk to accept the motion for filing and the judge to conduct a hearing pursuant thereto. Needless to say, such a hearing would have allowed the parents an opportunity to present their case fully within the first ten days after the granting of the original temporary order.

Instead of proceeding with the motion to modify, a remedy available under Chapter 17 of the Family Code, the attorney for the plaintiff filed a Petition for Writ of Habeas Corpus in the Juvenile Court of Harris County, Texas. Without alleging in specific terms the manner in which the children were "illegally confined and restrained" by Harris County Child Welfare, the Sims petitioned the Court to have the children brought immediately before the Court so that they might be returned to the Petitioners. The Court held a hearing and refused to grant the petition on April 5, 1976. No further action has been taken in the habeas corpus matter.

At the hearing on Petition for Writ of Habeas Corpus, the Juvenile Court was advised that the parents and children were residents of Montgomery County, Texas.

The Juvenile Court of Harris County allowed the Harris County Child Welfare Unit until 5:00 P.M. on April 5 to file a proceeding under Chapter 11 and 14 of the Family Code after which the matter would be transferred to Montgomery County. An Original Petition in Suit Affecting Parent-Child Relationship was filed and an ex parte temporary order in the nature of a temporary restraining order was issued pursuant to Section 11.11 of the Family Code. Further, the matter was transferred to the Juvenile Court of Montgomery County pursuant to Section 11.06 of the Family Code. At this time, Paul Sims was in the hospital recovering from the physical abuse inflicted upon him by his parents. It was the feeling of the Harris County Child Welfare Unit that the children should not be returned to the parents until the parents had an opportunity to attend counseling. The judge agreed.

On April 6, 1976, after the temporary order pursuant to Section 11.11 was signed, the Juvenile Court of Harris County was unable to set a time for a hearing in Montgomery County on temporary injunction as required by Section 11.11(b) of the Family Code, and Rules 680 and 681, Texas Rules of Civil Procedure. Therefore, at the time of transfer of all papers to the Juvenile Court of Montgomery County, a temporary order was in effect, due to expire within 10 days from April 5, 1976, unless continued as provided in Rules 680 and 681, Texas Rules of Civil Procedure. This order provided that immediate temporary conservatorship be placed in Gene Lege, Director of the Harris County Child Welfare Unit, with respect to the three Sims children. However, the order did not state, on its face, that it was an ex parte order or that it was to expire in 10 days.

On April 9, 1976, the file in the Sims case was received by the Juvenile Court of Montgomery County, Texas. The order signed by Judge Robert L. Lowry, Juvenile

Judge of Harris County, was evidently treated as a preliminary injunction, rather than as a temporary restraining order by Judge Coker of the Juvenile Court of Montgomery County, Texas. Consequently, no hearing on a temporary injunction was set nor was any service of process issued. The attorney for the Sims did not seek to have such a hearing set down or to obtain a writ of mandamus requiring one to be held.

Instead of the plaintiff seeking a full evidentiary hearing on the merits, on April 29, 1976, this cause was filed in United States District Court. At a hearing on May 5, 1976, the Court found that the Sims children were not in the legal possession of the Harris County Child Welfare Unit. Due to the expiration of the temporary restraining order, issued ex parte under Section 11.11 of the Family Code, this Court issued an order returning the children to the custody of their parents.

In taking action to return the Sims children to the custody of their parents on May 5, 1976, this Court advised the State Department of Public Welfare and its attorneys that the State was not enjoined from taking action under state law to properly establish a temporary conservatorship in the State Department of Public Welfare.

On May 14, 1976, the State Department of Public Welfare sought, once again, to protect Paul Sims by filing another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County, Texas.

The Court was asked to appoint Helen Jurries, Supervisor, State Department of Public Welfare, as Managing Conservator of Paul Sims. On May 14, 1976, Judge Coker signed a show cause order with writ of attachment which ordered Paul Sims delivered to Mr. and Mrs. James Carter, the grandparents by adoption of

Paul Sims, and naming them temporary managing conservator of Paul Sims. The court set a hearing for May 21, 1976, at which the continuation of the temporary conservatorship was to be considered. Despite several efforts to serve this writ, the Sims were not served and the date for the hearing was changed to June 10, 1976.

On May 21, 1976, the Plaintiffs filed an application for temporary restraining order seeking to halt state court proceedings. A temporary restraining order was granted, ex parte, on May 21, 1976. A hearing was held on June 7, 1976, at which time an order was issued restraining any further proceedings in state court, pending final adjudication on the merits herein.

Instead of leaving this suit in state court, where all constitutional and substantive questions in this matter could be adjudicated, this Court is faced with a challenge to a state statute, formulated after several years of careful consideration. The plaintiffs, thus far, have been allowed to escape any carefully considered presentation of the merits of the child abuse questions herein. Further, they seek to completely nullify all of the provisions of Chapters 11, 14, 15, 17 and 34 of Title II of the Texas Family Code.

The Defendants, if necessary, will fully support the reasonableness, compelling state interest, and constitutionality of the Family Code provision challenged herein.

JURISDICTION

PLAINTIFFS ALLEGE THAT:

Jurisdiction is conferred on this Court under: 28 U.S.C. 1331, this being an action wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the

Costitution (sic), laws or treaties of the United States; 28 U.S.C. 1342(3)(4), this being an action authorized by the self-executing provisions of the Fourteenth Amendment to the Constitution of the United States, as well as by 42 U.S.C. 1983 to redress the deprivation under color of state law of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing equal rights or civil rights of all persons within the jurisdiction of the United States; and, this is a proper case for determination by a three-judge court pursuant to 28 U.S.C, Sections 2201, 2281 and 2284, since Plaintiffs seek an injunction to restrain Defendants, one or more of whom are state officers, from the enforcement, operation and execution of state statutes of statewide applicability on the grounds that said statutes are contrary to the Constitution of the United States.

DEFENDANTS:

As to Defendants Raul Jimenez, Jamie Clements, Hilmar G. Moore, Raymond Vowell, Gene Lege and Marian Lockely (sic) in their individual capacities and in their official capacities, insofar as they are sued for damages and injunctive relief under 42 U.S.C. 1981 and 1983, there is no case or controversy against said defendants under the pleadings in this cause, according to the law set forth in *Rizzo v. Goode*, 45 U.S.L.W. 4095 (1976).

The defendants herein further urge in their Motion to Dismiss, that this court should refrain from assuming jurisdiction in this controversy under the principles of comity and federalism set forth in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

Further, the Defendants would show a lack of standing in the plaintiffs to challenge any provision of Chapter 15 of the Texas Family Code, since the state did not seek any application of that Chapter to the plaintiffs.

Further, the plaintiffs should have standing to challenge only those portions of Chapters 11, 14, 17 and 34 of the Family Code as were applied to them.

CONTENTIONS OF THE PARTIES

I. PLAINTIFFS CONTEND THAT:

1) This Three-Judge Panel should grant Plaintiffs Declaratory Relief and thereby remove the doubt and uncertainty surrounding substantive and procedural interpretations of the many provisions of Chapters 34, 35, 17, 11, 14 and 15 of Title 2, Texas Family Code giving rise to: 1) A real and actual controversy between parties having adverse legal interests; 2) with legal issues of such immediacy and reality as to be ripe for determination; and, 3) involving dispute over constitutionally-guaranteed rights, privileges, immunities and liberties of Plaintiffs.

2) The reciprocal rights of family unity, integrity, privacy and mutual association emanating between parent and child are basic fundamental freedoms protected by the United States Constitution.

3) Plaintiffs recognize a legitimate interest of the State in protecting children. However, State intrusion into the fundamental liberties of family freedom, unity and privacy must be accomplished through statutes which are within limitations imposed by the Constitution and the interest of the State should be harnessed by Procedural Due Process.

4) Provisions of Chapters 34, 35, 17, 11, 14 and 15 of Title 2, Texas Family Code are repugnant to and violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, both on their face and as applied; and additionally are

violative of Substantive Due Process and Void For Vagueness in that they are couched in terms having no common meaning and fail to provide explicit, specific, ascertainable standards which are incapable of arbitrary, erratic and capricious enforcement.

List of Particulars:

§34.01 Is facially unconstitutional in that it is void for overbreadth.

§34.02(a) Is facially unconstitutional and void for vagueness.

§34.03 Is facially unconstitutional in cloaking the person reporting with immunity from civil and criminal bility (sic), thus denying rights to confrontation and cross-examination, particularly those who by provisions of 34.02(d) may report anonymously.

§34.04 Is facially unconstitutional in that it violates the privilege against self-incrimination.

§34.05 Is facially unconstitutional in that it is violative of First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendment protections of family unity, rights to privacy, freedom from unreasonable search and seizure, rights to counsel of the minors affected, and procedural due process. It is further facially violative of the same protections herein enumerated in that it interlocks and is interdependent upon the Sections hereinabove set forth, as well as with §34.02(d).

§35.04 Is facially unconstitutional in that it infringes upon fundamental family rights protected by the First and Ninth Amendments without protection of procedural

due process; sweeps away First, Fifth and Fourteenth Amendment guarantees not to be subjected to examinations by physicians on the part of minors absent judicial order therefor or consent of parents; takes away rights of parents granted by §12.04, Title 2, Texas Family Code; and additionally is void for overbreadth.

§17.01 Is facially unconstitutional in that it is violative of substantive and procedural due process and of rights to equal protection of law; and further is void for vagueness and overbreadth.

§17.02 Is facially unconstitutional and void for vagueness in that it sets no standard for "immediately", no guidelines for the "hearing"; and is further violative of substantive and procedural due process in that it omits to place a burden upon the State to justify its interference into fundamental family rights.

§17.03 Is facially unconstitutional in that it sweeps away rights to notice and thus is violative of procedural due process.

§17.04 Is facially unconstitutional in that it is void for vagueness and overbreadth by omitting to define "immediate" and "emotional injury" and "on a showing" and to set standards therefor; further, it is facially violative of procedural due process.

§17.05 Is facially violative of procedural due process, in that it permits stacking of ex parte orders, places the burden upon parents to go forward to restore fundamental family unity rather than upon the State to justify

its interference therewith, permits the interference of the State into First, Fourth, Fifth, Ninth penumbrally-protected rights to flow from "the 10-day period following the date of the order" rather than from date of seizure of children, and is further unconstitutionally void for vagueness in that no burden is placed upon the State to return children or penalty for its failure to do so, and thus, is additionally unconstitutional by omission of safeguards for fundamental rights.

§17.06 Is facially unconstitutional in that it is violative of procedural due process in placing a burden upon the parents to give notice for modification of an ex parte order under interlocking and interdependent §17.03 which places no burden of notice upon the State, and thus is violative of the Equal Protection Clause;

As applied to Plaintiffs, it unconstitutionally swept away their rights to procedural and substantive due process in that they were unable to obtain a hearing upon their Motion To Modify at a time when State interference had already disturbed their fundamental rights to family unity and privacy without notice or hearing under interlocking and interdependent Sections of Chapters 17 hereinabove set forth already set in motion against them through State action.

§17.07 Is facially unconstitutional in that it is violative of of (sic) procedural due process by omission by providing appeal does not stay a §17.04 ex parte order yet fails to provide

an expedited hearing as a minimal procedural due process safeguard, and is further violative of the Equal Protection Clause in treating such cases specially.

§17.08 Is facially unconstitutional as violative of procedural due process in that it interlocks and is interdependent upon §11.05 which allows the State to pick and choose jurisdiction, thus unconstitutionally delegating legislative and judicial authority to a State Agency.

§17.09 Is facially violative of substantive due process and is void for vagueness in its attempts to wrap those persons who effectuate summary seizure of children in immunity from civil liability upon a standard of "reasonable cause to believe there was an immediate danger to the physical safety or emotional well-being of the child," and is thus overbroad as well as chilling to fundamental family unity and privacy.

§11.03 Is facially unconstitutional by omission in that it sets no standards or safeguards for substantive and procedural due process whereby the State must show its standing and legitimate interest in interference with fundamental family rights by a "clear and convincing" standard of proof at a probable cause hearing had a meaningful time to show 1) emergency and/or exigent circumstances; and 2) that the parents are the cause thereof.

It is further facially void for overbreadth in providing standing to interfere with

fundamental family rights on what amounts to an unlimited basis to those who have not established a right to interfere by a probable cause hearing upon a "clear and convincing standard" of proof and done so at a meaningful time.

§11.04(a)
§11.04 c(1)
§11.05(a)
§11.05(c)
§11.06(a), (c), (d), (e), (f), (g), (h)
§11.071(a) (1), (2), (b), (c)

Are facially unconstitutional in that they form a statutory scheme whereby their interlocking and interdependence are violative of procedural due process through built-in delays; are void for vagueness in that they are capable of arbitrary application; permit the State to set jurisdiction, thus unconstitutionally delegating legislative and judicial authority to a State Agency, and affirm jurisdiction set by a State Agency's mistake, and are thus further violative of procedural due process and place the burden upon parents to attack such jurisdiction set by mistake rather than upon the State Agency having such unconstitutional legislative and judicial authority; and are violative of the Equal Protection Clause in that rights of appeal from §11.06(f) transfers or failures to transfer are treated specially and removed on the face of such statute.

Further, as applied to plaintiffs, by arbitrary application of transfer provisions, fundamental family rights to unity were caused to be distrupted (sic) for an additional period of 29 days without notice or hearing.

§11.09 Is facially violative of procedural and substantive due process in that fundamental family unity can be interfered with by providing for notice by certified mail.

§11.10 Is facially unconstitutional by omission to provide Sixth Amendment rights to counsel for children in proceedings affecting fundamental family rights; and is further violative of substantive and procedural due process in permitting a State Agency to act as guardian ad litem in suits wherein such Agency is a litigant with an interest in the outcome of the case.

§11.11 Is facially unconstitutional and violative of procedural due process, and was unconstitutionally applied to Plaintiffs as well, in permitting and authorizing stacking of ex parte orders through coupling with §17.05, in omitting to provide for mandatory return of children by a State Agency at the expiration of such Orders together with safeguards and penalties for failure of the State Agency so to do upon the expiration of such orders; further, by authorizing built-in delays to further disrupt and interfere with fundamental family rights.

§11.12 Is facially violative of substantive due process in that a State Agency is authorized to make social studies for submission to the fact-finder in suits in which the Agency is a party litigant with an interest in the outcome of the case, thus creating bias and prejudice against the parents and in favor of the State Agency.

§11.13 Is facially violative of procedural due process and Sixth Amendment rights to trial by jury.

§11.15 Is facially unconstitutional and violative of procedural and substantive due process by omitting to provide a "clear and convin-

cing" standard of proof in the initial stages of litigation and "beyond a reasonable doubt" standard of proof at final hearings for civil statutes which so affect fundamental family rights as to be penal in nature and to require the standards of proof for penal statutes.

§11.16 Is facially unconstitutional in that it is violative of procedural due process in treating such cases specially and sweeping away rights to notice and to be informed of procedures affecting fundamental rights.

§14.07 (a), (b) Are facially unconstitutional and void for vagueness by omitting to provide standards of common meaning which are capable of even-handed enforcement; and are further facially violative of substantive due process in omitting to consider reciprocal rights which flow between parent and child to comprise fundamental family unity.

§15.02(1) (D), (E), (I) and (2) Are facially void for vagueness by being couched in terms which are incapable of a common meaning; interlocks and is interdependent with §34.05 to violate substantive and procedural due process, Fifth Amendment rights against self-incrimination, and Ninth Amendments rights to privacy.

All The Foregoing Sections When taken together as a whole because of their interlocking and interdependence were either applied to Plaintiffs or Plaintiffs received substantial threats of the imminent application thereof against them as to amount to violation of their First, Fourth, Fifth, Sixth, Ninth, Tenth and

Fourteenth Amendment rights and of the rights of the minor plaintiffs to a writ of habeas corpus as guaranteed by Article I, Section 9 of the United States Constitution.

5) This Three-Judge Panel should further grant Plaintiffs permanent injunctive relief against enforcement of those provisions of Title 2, Texas Family Code in controversy, under color of which Defendants have caused Plaintiffs to confront herein a situation involving: 1) Extraordinary circumstances whereby irreparable harm and injury resulted to Plaintiffs, and against which they have no other adequate protection for the future; 2) repeated bad-faith prosecutions and harassment by Defendants; and, 3) flagrant, patent violations of constitutional rights, privileges and immunities guaranteed to Plaintiffs.

6) The Central Registry (CANRIS) set up, maintained by and under sole control of the Texas State Department of Public Welfare under color of Sections 34.02(d), 34.06 and 34.08 of Title 2, Texas Family Code is violative of individual rights secured by the First, Fourth, Fifth and Ninth Amendments.

List Of Particulars:

§34.02 (d) Is facially unconstitutional in that it authorizes and permits "anonymous" reports, thereby violating rights to confrontation of witnesses; is void for vagueness in its failure to set standards for even-handed application and enforcement by omitting to define "abuse"; and interlocks into §34.06 to carry forward the same violations of guaranteed rights.

§34.06 Unconstitutionally facially delegates judicial

authority to a State Agency to determine and apply provisions of §34.02(d) without affording notice or opportunity to those affected to refute same and absent judicial determination of guilt for "abuse" or "neglect"; unconstitutionally violates substantive and procedural due process, equal protection of the laws, and rights to privacy.

§34.08 Is facially unconstitutional in that it sweeps away rights to notice and to be informed of charges against a person, to be confronted with the witnesses against a person, and unconstitutionally on its face delegates judicial and legislative authority to a State Agency and attempts to cloak such Agency with rights to confidentiality to such information so gathered.

All Sections Above Are cumulatively violative of the *Freedom Of Information Act*, 5 U.S.C.A. §553 (1970), as amended; the *Family Education And Privacy Act of 1974*, 20 U.S.C.A. §1232g, as amended; and *V.A.T.S. Art. 6252-17a.*

II. DEFENDANTS CONTEND THAT:

The Defendant agents and employees of the State Department of Public Welfare claim that local welfare workers acted in good faith to protect the best interest of the children, Paul, Shawana and Sabrina Sims, by seeking valid judicial orders in Harris and Montgomery Counties to create a temporary managing conservatorship and give the managing conservator temporary custody of the children. This occurred after evidence of severe physical abuse was found, for which both parents have some responsibility. The defendants acknowledge that the children were kept in foster

homes after a temporary order under Chapter 11 had expired. However, the parents, who retained an attorney shortly after the children were taken from the home were remiss in failing to insist on their right to file a motion to modify the order of the Harris County Court and to have an evidentiary hearing on the same. Likewise, they failed to insist upon their right to a hearing from the State Court in Montgomery County. The Defendants would further show that, while there may have been a failure to comply with one aspect of the Texas Family Code, the Code is constitutional on its face and there is a compelling state interest to allow quick and effective emergency removal of children from homes where child abuse occurs.

ADMISSIONS OF FACT

PLAINTIFFS AND DEFENDANTS LIST THE FOLLOWING FACTS THAT HAVE BEEN STIPULATED AND ADMITTED AND WHICH WILL REQUIRE NO PROOF:

1. On March 25, 1976, adult and minor plaintiffs maintained a residence located at Route 3, Box 1304, Conroe, Montgomery County, Texas.

2. On March 25, 1976, the three minor plaintiffs were enrolled in and regularly attending classes at John G. Osborne Elementary School in Houston, Harris County, Texas, for which adult minor (sic) plaintiffs paid a monthly tuition charge to the Houston Independent School District.

3. Minor plaintiff Sabrina Marie Sims, the only natural born child of adult plaintiffs, was born to them August 16, 1967, and is now age nine years.

4. Minor plaintiff Paul Edward Sims was born December 10, 1967, is now age eight years, and was

adopted by adult plaintiffs through Harris County Child Welfare Unit (hereafter referred to as Child Welfare) pursuant to Decree of Adoption granted July 18, 1974, by Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas (hereafter referred to as Juvenile Court).

5. Minor plaintiff Shawana Evette Sims was born March 2, 1969, is now age seven years, and was adopted by adult plaintiffs through Child Welfare pursuant to Decree of Adoption granted by Judge Lowry on August 12, 1975.

6. On March 25, 1976, in response to a telephone report of child abuse made by personnel of John G. Osborne Elementary School regarding only the minor plaintiff Paul Edward Sims, Child Welfare's agent and employee Caseworker Rex Downing went to the school.

7. That Casewarker (sic) Downing who went to the school March 25, 1976, to make investigation interviewed the minor plaintiff Paul Edward Sims who had been the subject of the telephone report of abuse for "Maybe a couple of minutes, three minutes."

8. That Rex Downing took possession and control of Paul Edward Sims, Shawana Evette Sims and Sabrina Marie Sims on March 25, 1976.

9. That Harris County Child Welfare did not physically deliver the three minor plaintiffs to the Court on March 25, 1976, nor were they delivered to the Court at any time prior to April 4, 1976. On April 5, 1976, minor plaintiffs were delivered to the Juvenile Court of Harris County pursuant to Subpoena for Writ of Habeas Corpus. There was no notice or hearing afforded any of the plaintiffs by the Juvenile Court of Harris County, Texas.

10. The following day, March 26, 1976, at 4:54 P.M., Betsy C. Conner filed a Suit For Protection of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code, which was docketed under Cause No. 38,295 in the Juvenile Court Number One of Harris County, Texas, and in which all three minor plaintiffs were made subjects of suit.

11. No names of places of residence of the parents or persons responsible for the care of the three minors appears at any place in the suit referred to in paragraph 10, supra, although the Petitioner therein requests "that citation and notice be issued to all persons named."

12. Six minutes after time of filing of such suit and at 5:00 P.M. on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court entered an Ex Parte Order by the terms of which Gene Lege, Director of Harris County Child Welfare was made temporary managing conservator of the three minor plaintiffs.

13a. On its face such Ex Parte Order recited that the matter was presented to the Court in chambers, without notice to or hearing afforded the adult plaintiffs.

13. No notice, citation or process of any kind was ever issued or served upon the adult plaintiffs in connection with the suit docketed as Cause No. 38,295 filed March 26, 1976. There was no hearing afforded any of the plaintiffs by the Juvenile Court of Harris County, Texas.

14. On March 31, 1976, counsel for the adult plaintiffs filed a Motion To Modify Termporary (sic) Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders.

Both instruments were stamped "JUV" by the Clerk of the Juvenile Court but were returned to counsel for adult plaintiffs by the Clerk who testified in a hearing before Honorable John V. Singleton on May 5, 1976 at Pg. 75 of the transcript, "Well, with the absence of Judge Lowry, I had taken to Judge Coe, and Judge Coe said he did not want to intervene in any of Judge Lowry's orders that he'd already signed in a case and he's (sic) rather for Judge Lowry to see this and he did bring in to my attention to file a Writ of Habeas Corpus in the District Clerk's office".

15. On March 31, 1976, counsel for adult plaintiffs filed a Petition For Writ of Habeas Corpus seeking return of the three minor plaintiffs, which suit was docketed as Cause No. 1,069,341 in the Juvenile Court Number One of Harris County, Texas, and upon which a hearing was set for April 5, 1976, at 10:30 A.M., at which time the minor plaintiffs were delivered to the Court pursuant to Subpoena for Writ of Habeas Corpus upon Gene Lege.

16. Adult plaintiffs caused notice of the filing of their Petition For Writ of Habeas Corpus and of the hearing set thereon to be served upon Gene Lege, Director of Harris County Child Welfare and also issued Subpoenas for attendance of witnesses.

17. On the date and at the time scheduled for hearing on the Petition For Writ of Habeas Corpus, Judge Lowry determined that all of the Plaintiffs were residents of Montgomery County, Texas.

18. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the Habeas Corpus proceeding, although Judge Lowry had personal knowledge that the three minor plaintiffs were restrained in Harris

County, Texas, by virtue of his own Ex Parte Order entered March 26, 1976.

19. The Docket Sheet entry made in Cause No. 1,069,341 in the handwriting of Robert L. Lowry, Judge of the Juvenile Court Number One of Harris County, Texas, on April 5, 1976, reads as follows: "Venue in Montgomery County - Case transferred to Montgomery County."

20. Later and at 4:47 P.M. on April 5, 1976, Betsy C. Conner filed a second suit in Cause No. 38,295 on the docket of the Juvenile Court Number One of Harris County, Texas, entitled Original Petition In Suit Affecting The Parent-Child Relationship.

21. At a time subsequent to the 4:47 filing of the Original Petition referred to in Paragraph 20, supra, but still on April 5, 1976, Judge Lowry entered a second Ex Parte Order continuing temporary managing conservatorship, possession and control of the three minor plaintiff in Gene Lege, Director, Harris County Child Welfare.

22. This second Ex Parte Order setting both temporary and final hearings in the second suit shows them both to be set for "the ___ day of _____, 19__ at _____ O'clock __M." and appoints "An attorney _____ . .to serve as guardian ad litem and attorney ad litem and represent the minor child(ren) at all hearings. . .". On its face this same Order recites it was presented to the Court in chambers.

23. On May 5, 1976, at a hearing in the Federal Court, there was testimony adduced that the blanks appearing in the Order had never been filled in.

24. On April 6, 1976, Docket Sheet entries made in the handwriting of Judge Lowry show the Suit

Affecting the Parent-Child Relationship (Cause No. 38,295) and the Habeas Corpus proceeding (Cause No. 1,069,341) were transferred to the Juvenile Court of Montgomer (sic) County, Texas, while the minor plaintiffs remained in Harris County in the possession of Harris County Child Welfare.

25. On April 9, 1976, the full file in Cause No. 38,295 transferred by the Juvenile Court Number One of Harris County, Texas, was received by the Juvenile Court of Montgomery County, Texas, and docketed under Cause No. 3,030.

26. From April 6, 1976, when the file was received by the Montgomery County Juvenile Court up to and including May 5, 1976, the first date of hearing before this Court, no notice, citation or process of any kind was issued or served upon the adult plaintiffs in Cause No. 30,030 not were they afforded opportunity for hearing before the Juvenile Court of Montgomery County, Texas.

27. The three minor plaintiffs remained in the possession and control of Harris County Child Welfare during such period referred to in item 26, supra.

28. On May 4, 1976, still seeking return of their children, adult plaintiffs filed an Application For Leave To File Writ of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting in Houston. Such application was denied by the Court for lack of jurisdiction on May 4, 1976.

29. Plaintiffs' First Complaint was filed with the Federal Court on April 19. 1976.

30. Nine days after this Court ordered return of the minor plaintiffs, a third suit was begun by the filing of an Original Petition In Suit Affecting the Parent-

Child Relationship which was docketed as Cause No. 3,090 in the Juvenile Court of Montgomery County, Texas, on May 14, 1976.

31. The suit filed in Montgomery County on May 14, 1976, referred to in Paragraph 30, wupra (sic), pertained only to the minor plaintiff Paul Edward Sims and had attached as an Exhibit the identical Exhibit attached to the suit filed March 26, 1976, in Harris County, Texas, under Cause No. 38,295.

32. Based upon medical information and other information which was fifty (50) days old, Ernest Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas issued an Ex Parte Writ of Attachment for the minor plaintiff Paul Edward Sims on May 14, 1976.

33. On May 21, 1976, counsel for plaintiffs made application for and Honorable John V. Singleton, Jr. entered a Temporary Restraining Order which was followed by and Order of Preliminary Injunction of this three-judge court entered June 18, 1976, restraining and enjoining defendants from filing or prosecuting any state suit based upon the state statutes to which plaintiffs have lodged this constitutional challenge.

34. This three-judge Court found "irreparable harm and injury to Plaintiffs: 1) by the very fact that in the initial proceeding initiated by the State the plaintiffs' family unit was disrupted for a total or forty-two (42) days without any type of relief afforded to plaintiffs; and 2) if the defendants were allowed to initiate further proceedeings (sic) plaintiffs would be placed in a similar situation as they had been prior to obtaining Federal Court relief."

35. That Raymond Vowell, Commissioner, State

Department of Public welfare (sic) has answered by Interrogatory No. 10 that "the source of the CANRIS report has been deleted in accordance with Sec. 34.08 of the Texas Family Code."

36. That on or about April 7, 1976, and before the May 5, 1976, hearing in Federal Court, that Rex Downing as caseworker for the Harris County Child Welfare Unit knew or had cause to know of Paul Sims' statements that "his teacher Mrs. Rhea had spanked him on March 25, 1976, at the John G. Osborne Elementary School".

37. That Rex Downing, Harris County Child Welfare Worker recommended Termination of the Paren-Child Relationship (sic) between the Sims and Paul Edward Sims.

PLAINTIFFS
CONTESTED ISSUES OF FACT

1. That Rex Downing took possission and control of the three minor plaintiffs Paul Edward Sims, Sabrina Marie Sims and Shawana Evette Sims shortly after 1:30 P.M. on March 25, 1976, and caused all three to be transported to the Child Welfare Clinic at 4040 Milam, Houston, Harris County, Texas.

2. No Writ of a magistrate was obtained by Rex Downing prior to his taking possession and control of the three minor plaintiffs. (State Department Objects On Relevancy.)

3. The only notice given to adult plaintiffs of the seizure of their children was be a telephone call to John Pleasant Sims on his job by the school principal.

4. The first hearing afforded plaintiffs after seizure of the three minor plaintiffs on March 25, 1976, was

that of May 5, 1976, before Honorable John V. Singleton, Jr. who ordered return of the three minor plaintiffs to the adult plaintiffs.

5. The names of all the plaintiffs now appear as perpetrators and/or victims of child abuse in a Central Registry by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (the date of initial seizure of the three minor plaintiffs) and May 5, 1976 (the date on which minor plaintiffs were ordered restored to adult plaintiffs by this Court), although no judicial finding of any such abuse has been made.

6. That John Pleasnat (sic) Sims and Mary Carter Sims were required by the Harris County Child Welfare Department to attent (sic) counseling sessions under Doctors Blair and Rita Justice at the Southwest Institute for Group and Family Therapy.

AGREED CONCLUSIONS OF LAW

1. There is a compelling State interest in having a quick and effective procedure for the emergency removal of children from homes where child abuse occurs.

2. Where a real, immediate, irreparable physical harm is likely to befall a child through abuse, the State may have an interest in taking emergency possession prior to obtaining a Writ.

PLAINTIFFS CONTESTED ISSUES OF LAW

1. There is a real and actual controversy between parties having adverse legal interest.

2. This Court should not abstain from interfering in 'ongoing juvenile proceedings', based upon the

YOUNGER-HUFFMAN principal. This case is an exception to the YOUNGER-HUFFMAN-LASSARD doctrines, in that;

   1. Plaintiffs have been victims of repeated bad-faith prosecutions and harrassment by defendants.

   2. Challenged state statutes are flagrantly and blatantly unconstitutional.

   3. Immediate and irreparable injury, danger and harm will result to plaintiffs.

3. All challenged provisions of Title 2, Texas Family Code, are facially unconstitutional, or unconstitutional as applied to plaintiffs, or are void for vagueness.

4. The evidence in this case has raised issues under Article I, Section 9, and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments of the United States Constitution.

5. Where the State seizes children under emergency situtation, prior to obtaining a writ, the State must immediately, and within twenty-four hours, provide for a due process adversary hearing or release the children to a parent or legal guardian or a person responsible for the children.

DEFENDANTS CONTESTED ISSUES OF LAW

1. Pursuant to *Rizzo v. Goode*, 45 L.W. 4095 (1976), there is no case of controversy between the plaintiffs and defendants. Raul Jimenez, Jamie Clements, Hilmar G. Moore, Raymond Vowell, Gene Lege, and Marian Lockley.

2. Pursuant to *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), the principles of federalism and comity prevent this Federal Court from interferring in on-going juvenile proceedings in the district court of Montgomery County, Texas.

3. The importance of protecting the health and safety of children on an emergency basis overrides the right of parents to notice and a hearing during the initial stage of a child abuse hearing.

4. The maximum time period of 20 days which may elapse between possession of a child under Chapter 17 and the holding of a hearing under Section 11.11(b) is consistent with due process requirements.

5. The challenged Family Code provisions concerning the reporting and investigation of child abuse and related provisions are not void for vagueness.

6. All challenged Family Code provisions are constitutional on their face.

7. The evidence in this case has raised no issues under Article I, Section 9 of the First, Fourth, Fifth, Sixth or Ninth Amendments of the United States Constitution.

PLAINTIFFS EVIDENCE

1. Petition in Cause No. 38,295, 'Suit for Protection of Child in Emergency', pursuant to Chapter 17, Texas Family Code.

2. Petition in Suit Affecting Parent-Child Relationship, Cause No. 38,295.

3. 'Show Cause Order' in Suit Affecting the Parent-Child Relationship, Cause No. 38,295.

4. Subpoena for witness in Cause No. 1,069,341, Brooks.

5. Subpoena for witness in Cause No. 1,069,341, Rhea.

6. Subpoena for witness in Cause No. 1,069,341, Mertens.

7. Subpoena for witness in Cause No. 1,069,341, Mrs. Melvin Jones.

8 & 10. Petition, Order For Hearing, and Order of Writ of Habeas Corpus in Cause No. 1, 069, 341. Sheriff's service of writ upon Gene Lege.

9. Docket sheet in Cause No. 1, 069,341.

11, 12 & 13. Central Record Files showing that the minor plaintiffs had not been the subjects of a suit affecting the parent-child relationship, dated April 14, 1976.

14. Letter, showing Instruments transferred from Juvenile Court of Harris County, Texas to the Juvenile Court of Montgomery County, Texas.

15. Order of Transfer in Cause No. 38,295, Order in Suit For Protection of Child in Emergency.

16. Cause No. 3,030, from Juvenile Court of Montgomery County, Texas, showing receipt of Cause No. 38,295 from Harris County, Texas.

17. Docket Sheet in Cause No. 38,295.

18. Motion to Modify in Cause No. 38,295.

19. Order to Modify in Cause No. 38,295.

20. Letter from the 14th Court of Civil Appeals denying Relator's motion for leave to file petition for writ of habeas copus for lack of jurisdiction.

20a. Complete file from 14th Court of Civil Appeals regarding the Sims.

21. Cause No. 3,090, 'Suit Affecting the Parent-Child Relationship as to minor plaintiff, Paul Edward Sims, filed in the Juvenile Court of Montgomery County, Texas, on the 14th day of May, 1976.

22. Ex Parte Writ of Attachment for Paul Edward Sims, issued on the 14th day of May, 1976, by Judge Ernest A. Coker.

22a. Docket Sheet in Cause No. 3,090, Montgomery County, Texas.

23. Temporary Restraining Order issued by Judge John V. Singleton on the 21st day of May, 1976.

24. Order of Preliminary Injunction, entered by the Three-Judge Panel on the 18th day of June, 1976.

25. Texas Department of Public Welfare 'CANRIS REPORT' incident number A061353, involving all the plaintiffs, showing date abuse occurred as 3/25/76.

26. Texas Department of Public Welfare 'CANRIS REPORT' showing date abuse occurred as 5/05/76.

27. CANRIS REPORTS, bearing deletions, same as numbers A061353 and A066060, attached to Raymond Vowell's answer to Interrogtory No.10.

28. Dr. Maire (sic) Surgi's hand written narrative report, regarding the minor plaintiffs, received from the State Department on or about September 2, 1976.

29. Dr. Marie Surgi's hand written narrative report regarding all plaintiffs, and letter from Jan Connerman, counsel for Dr. Surgi, received October 2, 1976.

30. Hospital records from St. Joseph's Hospital of Paul Edward Sims, from March 27 through April 7, 1976. (Stipulated)

31. Duplicate Card, showing Mrs. Rhea's report of paddling of Paul Edward Sims.

32. Article Four, Sections 473.100, 473.120 and 473.130 of Houston Independent School District Procedures, and Houston Independent School Reporting For for Child Abuse and Neglect.

33. Transcript of Zoe Martin.

DEFENDANTS EVIDENCE

1. Case notes of Rex Downing on the Sims family from March 25, 1976 through May 10, 1976. (Stipulated)

2. Medical records of Dr. Marie Surgi on the Sims children on March 25, 1976. (Stipulated)

3. Medical records of Dr. Jesus Diaz on Paul Sims from March 27, 1976, through April 7, 1976. (Stipulated)

4. Hospital records on admission of Paul Sims to St. Joseph's Hospital from March 27, 1976, through April 7, 1976. (Stipulated)

5. Psychological Evaluation by Comprehensive Series for Education (Ann Stanton) of Paul Edward Sims done on May 4, 1976. (Affidavit)

6a, b & c. Photographs of Paul Edward Sims' injuries taken by Rex Downing at Harris County Child Welfare on March 25, 1976.

7. Two photographs of Paul Edward Sims' injuries taken by Houston Police officer R. G. Hickman

at St. Joseph's Hospital on March 27, 1976.

8. Records of counseling by Dr. Blair Justice.

9. Records of counseling by Dr. E. E. Johnstone. (Stipulated)

10. Statistical Summaries of Incidents of Child Abuse in Texas.

11. Illustrative material on child abuse.

WITNESSES

PLAINTIFFS WOULD CALL THE FOLLOWING WITNESSES:

1. JOHN PLEASANT SIMS, Rt. 3, Box 1304, Conroe, Texas. Adult plaintiff; will testify as to the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

2. MARY CARTER SIMS, Rt. 3, Box 1304, Conroe, Texas. Adult plaintiff; will testify as to the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

3. SABRINA MARIE SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiff; will testify as to her knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

4. PAUL EDWARD SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiff; will testify as to his knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure. Paul will also testify that his teacher, Mrs. Theresa Rhea, paddled him along with other classmates on March 25, 1976, at a time after his father John Sims had left the school.

5. SHAWANA EVETTE SIMS, Rt. 3, Box 1304, Conroe, Texas. Minor plaintiff; will testify as to her knowledge of the seizure of the minor plaintiffs on March 25, 1976, and events following such seizure.

6. ZOE MARTIN, Deputy Clerk, Juvenile Court, Harris County Family Law Center. Will bring records and testify thereto of Case Numbers 38,295 and 1,069,311 involving all plaintiffs filed in the Juvenile Court, Harris County, Texas. (Transcript).

7. R. J. GRAY, Deputy Clerk, Montgomery County District Court, Conroe, Texas. Will bring records and testify thereto of Case Numbers 3,030 and 3,090 involving all plaintiffs filed in the Juvenile Court, Montgomery County, Texas. (Stipulated).

8. ROBERT LOWRY, Judge, Juvenile Court, Harris County, Texas. Will testify to all court proceedings involving all plaintiffs filed in the Juvenile Court of Harris County, Texas. (Subpoena).

9. CAROL JONES, 1700 North Loop East, Houston, Texas. Will testify that she is the Petitioner in Cause No. 3,090 involving minor plaintiff Paul Sims, filed in the Juvenile Court of Montgomery County, Texas (Adverse Witness). (Stipulated).

10. REX DOWNING, 2913 Louisiana, Houston, Texas. Mr. Downing will testify that he recommended termination of the parent-child relationship as to Paul Sims and the adult plaintiffs. (Adverse witness).

11. GLORIA JONES, 800 Ringold Street, Houston, Texas. Will testify as to her knowledge of the condition of the minor plaintiffs on March 25, 1976, and her participation in report of child abuse, and events following thereafter. (Adverse witness).

12. THERESA J. RHEA, 1212 Nashau Street, Houston, Texas. Paul Sims' teacher on March 25, 1976. (Adverse Witness).

13. DR. EULA FAYE PERRY, 3502 Liberty Road, Houston, Texas. Dr. Perry will testify about her examination and treatment of the Sims children after March 25, 1976. (Stipulated).

14. INEZ HARRIS, 800 Ringold Street, Houston, Texas. School nurse; will testify as to her participation in treating Paul Sims on March 25, 1976 and May 10, 1976.

21. RAYMOND VOWELL, Commissioner of the State Department of Public Welfare of the State of Texas, with offices in Austin, Travis County, Texas. (Adverse Witness).

DEFENDANTS WOULD CALL THE FOLLOWING WITNESSES:

1. REX DOWNING, 2913 Louisiana, Houston, Texas. Mr. Downing will testify about the casework he did concerning the Sims family. (Stipulated).

2. DR. MARIE SURGI, 4040 Milam, Houston, Texas. Dr. Surgi will testify about her knowledge of Paul Sims' injuries on March 25, 1976, including the paddling administered by Mr. John Sims. (Stipulated).

3. THERESA RHEA, Osborne Elementary School, 800 Ringold, Houston, Texas. Ms. Rhea will testify about her knowledge of Paul Sims' injuries on March 25, 1976, including the paddling administered by Mr. John Sims.

4. DR. JESUS DIAZ, Suite 1116, St. Joseph Professional Building, 2000 Crawford, Houston, Texas. Dr. Diaz will testify about the medical

condition of Paul Sims from March 27, 1976 through April 7, 1976.

5. DRS. BLAIR & RITA JUSTICE, 5925 Kirby Drive #221, Houston, Texas. Drs. Justice will testify about the psychological condition of Mr. and Mrs. Sims.

6. DR. E. E. JOHNSTONE, 1300 Moursund, Houston, Texas. Dr. Johnstone will testify about the need of Mr. and Mrs. Sims for continued counseling on their parenting skills. (Stipulated).

7. DR. EULA FAYE PERRY, 3502 Liberty Road, Houston, Texas. Dr. Perry will testify about her examination and treatment of the Sims children after March 25, 1976.

8. JUANA FALCON, 1300 Moursund Street, Houston, Texas. (TRIMS). Medical Records Clerk.

9. MS. BOBBIE MATTHEWS, John H. Reagan Building, Austin, Texas. Ms. Matthews will testify regarding data about child abuse in Texas.

10. MS. KAY LOVE, John H. Reagan Building, Austin, Texas. Ms. Love will testify regarding data about child abuse in Texas.

11. DR. JOAN HEBELER, 207 Barracuda, Galveston, Texas. Dr. Hebeler will testify about the medical aspects of child abuse.

12. DR. AUGUST R. TAROSI, 1203 Missouri, Houston, Texas. Dr. Tarosi will testify about the Comprehensive Services for Education Psychological Evaluation of Paul Sims.

EXPERT WITNESS
SUMMARY OF QUALIFICATIONS

NAME: Joan Rochelle Hebeler, M.D.

DATE: October 19, 1976

PRESENT POSITION AND ADDRESS:
Associate Professor
Department of Pediatrics
University of Texas Medical Branch
Galveston, Texas 77550

BIOGRAPHICAL:
Birth Date: April 30, 1934
Birth Place: Independence, Missouri
Marital Status: Single
Home Address: 207 Barracuda
Galveston, Texas 77550

EDUCATION:

1955	B.A., University of Wisconsin, Madison, Wisconsin
1958	M.D., University of Wisconsin, Madison, Wisconsin
1958-59	Internship, Rotation, University of Texas Medical Branch, Galveston, Texas
1959-61	Resident, Department of Pediatrics, University of Texas Medical Branch, Galveston, Texas
1961-62	Chief Resident, Director of Pediatrics; Fellow (6 months in Pediatric Cardiology and 6 months in Pediatric Menatology), University of Texas Medical Branch, Galveston, Texas
Aug. 1962	Fellow in Child Development, University of Texas
June 1963	Medical Branch, Galveston, Texas

MEMBERSHIP IN SCIENTIFIC SOCIETIES:

American Academy of Pediatrics

Child Development, American Academy of Pediatrics, Member
American Medical Association
Texas Medical Association
Texas Pediatric Society
Galveston County Medical Society
Ambulatory Pediatric Association
Chairman of Committee Adoption and Dependent Care - Texas Academy of Pediatrics, 1976

ADDITIONAL INFORMATION:

1964 - Certified by American Board of Pediatrics
Fluent in Spanish

DEFENDANT MARIE L. SURGI'S PROPOSED FINDINGS OF FACT

1. That on March 25, 1976, Dr. Marie L. Surgi examined Paul Sims, Shawana Sims and Sabrina Sims with the express consent of their mother, Mary Louise Sims and the implied consent of their father John Pleasant Sims.

2. During her examination of the Sims children of March 25, 1976, Dr. Marie Surgi conducted herself as an ordinarily prudent doctor in the same or similar circumstances.

SETTLEMENT

An Oral Settlement Offer has been made by Defendants, The State Department, such offer being considered frivolous and without merit by Plaintiffs, has been orally rejected by Plaintiffs.

TRIAL

All Parties anticipate trial to last at least one week. All witnesses are available for the week of Octover 26, 1976.

Supreme Court, U. S.
FILED
OCT 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,
Appellants

v.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,
Appellees

On Appeal From the United States District Court For the Southern District of Texas, Houston Division

MOTION TO AFFIRM

WINDELL E. COOPER PORTER
J. QUINCY CARTER
ROBERT L. BYRD
609 Fannin Building, Suite 1909
Houston, Texas 77002

Attorneys for Appellees

September, 1978

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,
Appellants

v.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,
Appellees

On Appeal From the United States District Court For the Southern District of Texas, Houston Division

---

MOTION TO AFFIRM

Appellee in the above entitled cause moves the court to affirm the decree below in the above entitled cause and to dismiss the appeal therefrom, for the following reasons to wit:

I

That this civil action was filed to challenge the constitutionality of Title Two (2) sections 34.05(c), 34.06, 34.08, 11.10, 11.15, 17.02, 17.03, 17.05 and 17.06 of the Texas Family Code (1974).

II

Appellees alleged that they had been deprived of rights, privileges, liberties and immunities secured to them by the Constitution of the United States while acting under color of such State statutes and by the use of standards and procedures which are violative of Article I, Section 9 of the United States Constitution and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

III

Appellees sought a declaratory judgment declaring certain statutes of the State of Texas contained in Title 2, Texas Family Code repugnant to the Constitution of the United States, null and void on their face, and also as applied to Appellees. Appellees further requested the Court to permanently restrain and enjoin operation, enforcement and implementation of such State statutes and rules, regulations and policies made pursuant and incident thereto.

IV

JURISDICTION

Jurisdiction was invoked pursuant to the provisions of 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 2201, 2281, 2284; and the following provisions of the United States Constitution: Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments.

V

STATEMENT

Appellees are a family—father, mother and three minor children—one natural born, two adopted, ages nine, eight and seven.

VI

In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas.

VII

On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. On that same day, Rex Downing, a case worker employed by Harris County Child Welfare, acting without a court order, summarily seized the three minor Appellees.

VIII

A forty-two (42) day separation of the family unit ensued from the time of the seizure of the three minor Appellees on March 25, 1976 to May 5, 1976. The Federal District Court ordered the children returned to their parents on May 5, 1976. Appellees were not afforded a hearing, nor was process served or notice of a hearing issued at any time during the forty-two (42) day period.

IX

That the following is a chronology of events that transpired:

From and after seizure of the three minor Appellees on March 25, 1976, a 42-day separation of the family unit ensued, ending on May 5, 1976, when this Honorable Court ordered return of their children to the adult Appellees. During the forty-two (42) days, no process or notice of hearing issued, nor were Appellees afforded a hearing.

The following chronology of events occurred:

(1) On March 25, 1976, adult and minor appellees maintained a residence located at Route 3, Box 1304, Conroe, Montgomery County, Texas.

(2) On March 25, 1976, the three minor Appellees were enrolled in and regularly attending classes at John G. Osborne Elementary School in Houston, Harris County, Texas, for which adult Appellees paid a monthly tuition charge to the Houston Independent School District.

(3) Minor Appellee Sabrina Marie Sims, the only natural child of adult Appellees, was born to them August 16, 1967, and is now age nine years.

Minor Appellee Paul Edward Sims was born December 10, 1967, is now age eight years, and was adopted by adult Appellees through Harris County Child Welfare Unit (hereafter referred to as Child Welfare) pursuant to Decree of Adoption granted July 18, 1974, by Robert L. Lowry, Judge of the Juvenile Court of Harris County, Texas (hereafter referred to as Juvenile Court).

Minor Appellee Shawana Evette Sims was born March 2, 1969, is now age seven years, and was adopted by

adult Appellee through Child Welfare pursuant to Decree of Adoption granted by Judge Lowry on August 12, 1975.

(4) On March 25, 1976, in response to a telephone report of child abuse made by personnel of John G. Osborne Elementary School regarding only the minor Appellee Paul Edward Sims, Child Welfare's agent and employee Caseworker Rex Downing went to the school.

Mr. Downing took possession and control of not just Paul Edward Sims, regarding whom the report of child abuse had been made, but the two other Sims children as well, and did so shortly after 1:30 P.M. on that day, caused all three to be transported to the Child Welfare Clinic at 4040 Milam, Houston, Texas, where all three were examined by Dr. Marie L. Surgi over the express objection of adult Appellees.

(5) No writ of a magistrate was obtained by Downing prior to his taking possession and control of the three minor Appellees; and the only notice given to adult Appellees of the seizure of their children was by telephone calls to them on their jobs by the school principal.

(6) When Caseworker Downing went to the school on March 25, 1976, to make investigation he interviewed the minor Appellee Paul Sims who had been the subject of the telephone report of abuse for two to three minutes. Neither of the parents was interviewed prior to his taking possession and control of their three children.

(7) The minor Appellees were not delivered to any court on the date of their seizure, shortly after 1:30 P.M., March 25, 1976.

(8) The following day, March 26, 1976, at 4:54 P.M. Betsy C. Conner (a court representative who is not an

attorney) filed a Suit For Protection Of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code which was docketed under Cause No. 38,295 in the Juvenile Court Number One of Harris County, Texas, and in which all three minor Appellees were made subjects of suit.

(9) No names or places of residence of the parents or persons responsible for the care of the three minors appeared at any place in the petition although the Petitioner therein requested "that citation and notice be issued to all persons named."

(10) Only six minutes after time of filing of such suit and at 5:00 P.M. on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court entered an Ex Parte Order by the terms of which Gene Lege, Director of Harris County Child Welfare was made temporary managing conservator of the three minor Appellees.

On its face such Ex Parte Order recites that the matter was presented to the Court in chambers, without notice to or hearing afforded the adult Appellees.

(11) On March 31, 1976, counsel for the adult Appellees filed a Motion To Modify Temporary Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "Received" and "JUV" by the Clerk of the Juvenile Court but were returned to counsel by the Clerk who had been instructed not to set a hearing.

(12) On March 31, 1976, counsel for adult Appellees also filed a Petition For Writ Of Habeas Corpus seeking return of the three minor Appellees, which suit was

docketed as Cause No. 1,069,341 in the Juvenile Court Number One (1) in and for Harris County, Texas and upon which a hearing was set for April 5, 1976, at 10:30 A.M.

(13) Adult Appellees caused notice of the filing of their Petition For Writ Of Habeas Corpus and of the hearing set thereon to be served upon Gene Lege, Director of Harris County Child Welfare and also issued subpoenas for attendance of witnesses.

(14) On the date and at the time scheduled for hearing on the Petition For Writ Of Habeas Corpus, Judge Lowry determined that all of the Appellees were residents of Montgomery County, Texas. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the habeas corpus proceeding, although Judge Lowry had personal knowledge, the three minor Appellees were restrained in Harris County, Texas by virtue of the terms of his own Ex Parte Order entered March 26, 1976. The case was then transferred to Montgomery County, however, the minor Appellees remained in Harris County and in the possession of Harris County Child Welfare. The second cause filed by Harris County Child Welfare was also transferred to Montgomery County.

(15) On April 5, 1976, at 4:47 P.M., Betsy C. Connor filed a second suit in Cause No. 38,295 on the docket of the Juvenile Court Number One (1) in and for Harris County, Texas, entitled Original Petition In Suit Affecting Parent-Child Relationship.

(16) Subsequent to the 4:47 P.M. filing of the Original Petition, however, on April 5, 1976, Judge Lowry entered a second Ex Parte Order continuing temporary managing

conservatorship, possession and control of three minor Appellees in Gene Lege, Director, Harris County Child Welfare.

This second Ex Parte Order setting both temporary and final hearings in the second suit show them both to be set for "the ____ day of _____, 19____ at _____ o'clock _____.m." and appoints "An attorney _____. . . . to serve as guardian ad litem and attorney at litem and represent the minor child(ren) at all hearings. . . ." On its face this same Order recites it was presented to the Court in chambers, again without notice to or hearing afforded the adult Appellees.

On May 5, 1976, at hearing before the Federal District Court, there was testimony adduced that the blanks appearing in the Order had never been filled in. The transferred cases were received and docketed (Cause No. 3,030) in Montgomery County on April 6, 1976. No hearing of any kind was ever held by the Montgomery County Court. The three children remained in the possession and control of Harris County.

On May 4, 1976, still seeking return of their children, adult Appellees filed an Application For Leave To File Writ Of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting in Houston. Such Application was denied by the Court for lack of jurisdiction on May 4, 1976.

The first hearing afforded Appellees after seizure of the three minors on March 25, 1976, was that of May 5, 1976, before Honorable John V. Singleton, Jr. who ordered return of the three minor Appellees to the adult Appellees on May 14, 1976. Nine days after the Federal District Court ordered return of the minor Appellees,

a third suit was filed by the Appellants as an Original Petition In Suit Affecting The Parent-Child Relationship (docketed as Cause No. 3,090) in the Juvenile Court of Montgomery County, Texas.

(17) The suit filed in Montgomery County on May 14, 1976, pertained only to the minor Appellee Paul Edward Sims.

On May 14, 1976, Ernest L. Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas, issued an Ex Parte Writ of Attachment for Paul Edward Sims. A hearing was set for May 21, 1976.

On May 21, 1976, counsel for Appellees made application for a Temporary Restraining Order, which was granted by the Honorable John V. Singleton, Jr.

The Three Judge Court issued a Preliminary Injunction, restraining and enjoining Appellants from filing or prosecuting any action in state Court based upon the State statutes that were unconstitutional.

(18) This three-judge Court found "irreparable harm and injury to Appellees: 1) by the very fact that in the initial proceeding initiated by the State the Appellees' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Appellees; and 2) if the Appellants were allowed to initiate further proceedings Appellees would be placed in a similar situation as they had been prior to obtaining Federal Court relief." (Order Preliminary Injunction entered June 18, 1976).

(19) The names of all the Appellees now appear as "perpetrators" and/or victims of child abuse in a Central

Registry maintained by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (date of initial seizure of the three minor Appellees) and May 5, 1976 (the date on which minor Appellees were ordered restored to adult Appellees by this Court), although no judicial finding of any such abuse has been made.

(20) Information gathered by Harris County Child Welfare in the course of adoption of the minor Appellees Paul Edward Sims and Shawana Evette Sims by the adult Appellees in 1974 and 1975 was not retired and sealed following such adoptions. In fact and instead, such information was referred to and used by such Agency and also transmitted to the Montgomery County Agency of the Department during the time of their seizure, possession and control of the minor Appellees.

That Dorothy Mae Woods, et al. 76-H-1120 was consolidated by Court order with the Sims case on July 16, 1976. The Plaintiffs in the Woods case were Dorothy Mae Woods and her minor child Rebecca E. Woods.

That the following is a chronology of the Woods case:

(1) The Woods originally filed this cause seeking to restrain the enforcement, operation and execution of Title 2, Chapter 11, 15 and 17 of the Texas Family Code and other discriminatory and arbitrary practices on the part of the State which violated rights guaranteed by the 14th Amendment of the United States Constitution.

(2) Dorothy Mae and Rebecca E. Woods had been receiving supportative service through the State Department of Human Resources prior to January 21, 1976.

(3) On January 21, 1976, Judy Albracht, an employee (Social Worker) of the State Department picked Rebecca E. Woods up from Nursery School without notice to Dorothy Mae Woods. The social worker left only a hand written note on the door of Rebecca Wood's residence. The note was dated January 21, 1976, 4 o'clock P.M., and stated: Mrs. Woods:

> "Harris County Child Welfare has picked up your daughter, Becky, and she is now in a foster home. I need to talk to you about this—call me as soon as possible."

It was signed by Judy Albracht.

(4) On the same day, employees of the State Department of Human Resources obtained a temporary order from Criss Cole, Judge of Juvenile Court Number Three (3) in and for Harris County, Texas. The order appointed the director of Harris County Child Welfare as temporary managing conservator of Rebecca E. Woods. The order was obtained without presenting the child to a Judge and without the existence of an emergency as required by Title 2, Chapter 17, Section 17.01 of the Texas Family Code. Judge Cole set February 2, 1976, as the date for a show cause hearing to determine temporary custody pending final hearing on termination of parental rights.

(5) Dorothy Mae Woods received a telephone call from one of the Department's employees and was told the date and time of the show cause hearing. She was not served with process.

(6) The show cause hearing was held on February 2, 1976, and the Defendant was given temporary custody

and appointed temporary managing conservator of the minor child. Dorothy Mae Woods was present, however, she was not represented by counsel.

(7) The final hearing was set for April 8, 1976, however, the case was not heard until April 29, 1976.

(8) Dorothy Mae Wood's parental rights were terminated by Judge Cole on April 30, 1976; Harris County Child Welfare was appointed managing conservator and the attorney ad litem was awarded two hundred ($200.-00) dollars. Mrs. Woods was present and represented at the final hearing by Nicholas Serna, Esq., Gulf Coast Legal Foundation. The following events occurred:

May 20, 1976—A motion for a new trial was heard and denied.

May 26, 1976—Hearing, Order on Pauper's Oath signed.

May 28, 1976—Motion to Suspend the Trial Court's judgment pending appeal was denied; Ray Hardy's District Clerk's contest to Pauper's Oath overruled and Pauper's Oath sustained. An Order was signed on that date.

June 24, 1976—Finding of facts was signed.

July 2, 1976—Mrs. Woods complaint was filed with the Court (Federal District Court).

July 2, 1976—Motion to Maintain Class action and affidavit in support thereof was filed.

July 15, 1976—A transcript of the Juvenile Court's proceedings was filed with the Court of Civil Appeals First Supreme Judicial District of Texas at Houston, Texas.

July 16, 1976—Court's Order granted Mrs. Woods' attorneys to file Motion to Consolidate—Cause was consolidated with SIMS # 76-H-665 District Court of Texas at Houston, Texas.

July 21, 1976—The Statement of Facts was filed with the Court of Civil Appeals.

August 18, 1976—Mrs. Woods' et al.'s brief was filed with the Court of Civil Appeals.

October 14, 1976—Woods' Motion to Stay Proceedings in Federal Court was filed.

November 8, 1976—The above motion was granted by the Court.

(9) On December 8, 1976, the Texas Court of Civil Appeals reversed and remanded the Juvenile Court's Order which terminated the parent-child relationship (In Re: R.E.W., 545 S.L.2d 573 (C.A. 1976) opinion filed by Associate Justice Evans. The issue of the right of indigent persons to have Court appointed counsel in proceedings affecting the parent-child relationship was not dealt with by the above Court.

January 13, 1977—A Motion for Rehearing was filed by Appellee State Department et al, that motion was denied.

February 23, 1977—Woods' Petition for Writ of Error was filed with the Court of Civil Appeals.

May 11, 1977—The Texas Supreme Court refused Writs of Error, N.R.E.

May 25, 1977—The parties reached a settlement by way of a Return Home Agreement between Harris County Child Welfare and Dorothy May Woods. The agreement expired on November 30, 1977.

July 26, 1977—The Court of Civil Appeals issued its mandate. The mandate was forwarded to Ray Hardy, District Clerk, Harris County, Texas.

July 29, 1977—Rebecca E. Woods was returned to Dorothy Mae Woods.

(10) On August 17, 1977, an agreed Motion to Dismiss the cause and to receive all prior orders of the Juvenile Court terminating the parental rights of Ms. Woods, etc. was granted by the Juvenile Court.

February 27, 1978, Judgment was rendered on SIMS; the order in that cause expressly states "That this Court's consolidation of the issue of the right of indigent parents to have counsel was ill advised, but that issue shall remain pending in Civil Action Number 76-H-1120, before another Judge of this Court" (this case).

(11) The right of indigent persons to have court appointed counsel in proceedings affecting the parent-child relationship is being litigated at this point.

X

THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

Appellant fails to present both substantial questions and a meritorious question to be determined by this Honorable Court. Appellant fails to present specific issues to be adjudicated by this Court; further that the issues are general and not specifically stated and there is no evidence to show that fifty (50) other states have child abuse statutes similar to that of the State of Texas, in addition, that the effect of the Court's Order will

not put battered children back with their parents as the emergency provisions of Chapter 17 of the Texas Family Code provide for relief instances where children are in danger. The instant cases were not one in which the children were battered, in danger of serious harm or in danger of their lives.

The Court's order that an emergency ex parte hearing be held within a twenty-four hours period is required by the Due Process clause of the 14th Amendment of the United States Constitution, further that such hearings would not be impossible nor burdensome for the State of Texas with its conglomerate or resources, in addition, the State of Texas has instituted plans to comply with the decision of the Three Judge District Court.

An appointment of an attorney to represent the interest of the child is imperative as there are three interests to protect in suits affecting parent-child relationships. The standard of proof should be by clear and convincing evidence because of the relationship and interests involved and in order to justify the intervention of the state into the family unit. A Three Judge Court was proper in this cause pursuant to 28 U.S.C. §§ 2281, 2284, Three Judge District Court Action (1960).

XI

THAT ABSTENTION WAS NOT PROPER AND WOULD NOT HAVE BEEN WARRANTED DUE TO THE UNIQUE AND COMPELLING CIRCUMSTANCES OF THIS CASE

Appellants principally rely upon *Younger v. Harris,* 91 S.Ct. 746 (1971), in order to support their position that equitable restraint and comity required abstention,

however, the case at hand is an exception to that doctrine. This case could not have been disposed of on questions of state law. There was no conflict with the administration by a state with its own affairs. This was not an instance where there was unsettled questions of state law for the Court to resolve. Appellees had no adequate remedy at law and would have suffered great and irreparable harm if equitable jurisdiction had been denied. The statutes challenged were found to be both "flagrantly and patently violative of federal constitutional requirements." Further that several sections of the Texas Family Code were found to be unconstitutional either on their face or as applied. *Younger v. Harris* (supra); 438 F.2d 1179 (1978).

XII

THAT THERE WAS NO OPPORTUNITY FOR APPELLANTS TO FAIRLY AND PROPERLY PURSUE THEIR CONSTITUTIONAL CLAIMS IN AN ONGOING STATE PROCEEDING AND FURTHER THAT ABSTENTION WOULD HAVE BEEN IMPROPER AS THE CAUSE ON APPEAL IS AN EXCEPTION TO THE YOUNGER V. HARRIS PRINCIPLES.

This cause of action is an exception to and not barred by the anti-injunction provisions of 28 U.S.C. § 2282 (1948). The facts of the case meet the tests contained in *Younger v. Harris,* (supra), as extended to civil cases by *Huffman v. Pursue, Ltd.,* 95 S.Ct. 1200 (1975) and *Lessard v. Schmidt* (E.D. Wisc. May 28, 1976) for the granting of injunctive relief. See also *Newton v. Burgin,* 363 F. Supp. 782 (W.D. N.C. 1973).

The tests which qualify this case as an exception to the *Younger-Huffman-Lessard* doctrines are succinctly summarized by Chief Justice Burger's concurring opinion in *Allee v. Medrano,* 94 S.Ct. 2191 (1974), in which the Supreme Court affirmed a three-judge District Court of the Southern District of Texas, 347 F. Supp. 605, granting injunctive relief. Appellees quote Chief Justice Burger in *Allee v. Medrano,* (supra), at p. 2210.

> "To meet the *Younger* test the federal plaintiff must show manifest bad faith and injury that is great, immediate, and irreparable, constituting harassment of the plaintiff in exercise of his constitutional rights, and resulting in a deprivation of meaningful access to the state courts. The federal plaintiff must prove both bad faith and requisite injury. In judging whether a prosecution has been commenced in bad faith, the federal court is entitled to take into consideration the full range of circumstances surrounding the prosecutions which the federal plaintiff would have the district court interfere with."

XIII

That Appellants prosecuted the suit in bad faith in that Appellees had pending against them in the Texas State Courts two suits instituted by Appellant State Department under color of Chapter 11, Title 2, Texas Family Code:

(a) Suit filed April 5, 1976, in Harris County and subsequently transferred to Montgomery County affecting all three minor Appellees and,

(b) Suit filed May 14, 1976, in Montgomery County affecting only Minor Appellee Paul

> Edward Sims. (Filed only nine days after this Court restored the minor Appellees to the adult Appellees and announced request would be made for Three-Judge Panel.)

In the light of the tests for exceptions to *Younger,* supra, as set out in *Allee v. Medrano,* (supra), Appellees rely on the following findings of this District Court:

On May 21, 1976, after Appellees brought to the attention of this Court that Appellants had filed the second suit described in (B) above, Honorable John V. Singleton, Jr. entered a Temporary Restraining Order enjoining the State action finding:

> "that Plaintiffs will suffer immediate and irreparable injury, loss and damage if Defendants . . . for which Plaintiffs have no adequate remedy at law, and further in aid of the jurisdiction of this Court, pursuant to 28 U.S.C. 2283.", *Sims v. Jimenez,* (supra).

The Order of Preliminary Injunction entered by the Panel in this case on June 18, 1976, made the following affirmative finding:

> "That the Court did find irreparable harm and injury to Plaintiffs: 1) by the very fact that in the initial proceeding initiated by the State the Plaintiffs' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Plaintiffs; and 2) if the Defendants were allowed to initiate further proceedings Plaintiffs would be placed in a similar situation as they had been prior to obtaining Federal Court relief." *Sims v. Jimenez,* (supra).

The two suits described above were preceded by summary seizure of the minor Appellees on March 25, 1976, and by suit filed March 26, 1976, under color of Chapter 17, Title 2, Texas Family Code. In the Chapter 17 suit, Appellant State Department wholly failed to identify the parents.

In the next suit filed, Appellant State Department not only identified the parents but also blatantly recited their residence as being in another county, yet filed suit in Harris County. The Harris County Juvenile Court then placed conservatorship of the minor Appellees in Harris County, however, the litigation was transferred to Montgomery County, without notice or a hearing afforded adult Appellees.

The Harris County Juvenile Court apparently forgot about the case while the Montgomery County Juvenile Court acknowledged the case to the extent that it was assigned a case number and nothing more—no hearing was set, no process issued, nor was notice given.

The adult Appellees sought redress before the Federal District Court and secured return of the minor Appellees, the Montgomery County Unit of Child Welfare, having never seen the minor Appellee Paul Edward Sims who remained in a foster home in Harris County, filed its Chapter 11 suit referred to in (B) above, based solely on hearsay information obtained from Harris County Child Welfare Department. The information was at least 50 days old.

The Montgomery County Juvenile Court then issued an ex parte Writ Of Attachment for the Minor Appellee Paul Edward Sims.

The Federal District Court relying upon *Watson v. Buck,* 61 S.Ct. 962 (1941) found that the state statutes involved were flagrantly and patently violative of Federal Constitutional requirements, *Sims v. State Department of Public Welfare, Et Al.,* 438 F. Supp. 1188 (1977).

XIV

Extra ordinary circumstances as referred to in *Younger v. Harris* (supra) are present in this case. The Federal Court found those circumstances to be:

(a) the confusion involved in this case,

(b) the procedural irregularities, and

(c) an absence of a fair opportunity for Appellees to fairly pursue their constitutional claims in an ongoing state proceeding. *Younger v. Harris* (supra), *Trainor v. Hernandez,* 97 S.Ct. 1911 (1977); *Judice v. Vail,* 97 S.Ct. 1211 (1977) and *Gibson v. Berryhill,* 93 S.Ct. 1689 (1963).

XV

This action is multifaceted and . . . "there is no single state procedure to which Appellee's may look for relief on any other ground. The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This Court will not consider part of the scheme and abstention from another part. To do so, would seriously jeopardize any hope for an effective statutory scheme and in the name of comity and federalism, would do violence to the state functions that those principles seek to protect." *Sims v. State Department of Public Welfare* (supra) (p. 1107).

XVI

THAT THE ENJOINING OF STATE PROCEEDINGS DID NOT DISRUPT THE STATE'S PROTECTION WHICH UNDERLIES ITS CRIMINAL LAW

Appellant's reliance upon *Huffman v. Pursue, Ltd.* (supra), is not justified for the following reasons:

(a) There was no interests underlying the criminal laws of the State of Texas in this cause.

(b) extraordinary circumstances are present in this cause which justify federal injunctive relief.

(c) appellees did avail themselves of opportunity to fairly pursue their claim in state court. Judice, *supra.,* Gison, *supra,* Sims, *supra*

(d) further that Appellees would not be required to exhaust state Appellate remedies as the state proceeding was conducted in bad faith, and with an intent to harass.

(e) in addition, the statutes challenged were flagrantly and patently unconstitutional.

XVII

TRAINOR V. HERNANDEZ IS NOT APPLICABLE IN THIS CASE

Trainor v. Hernandex, supra, is not applicable to this case, presently on appeal in that the above case, an extension of, the *Younger* doctrine, addresses actions that do not warrant intervention by the Federal Courts due to absence of extraordinary circumstances; such is not the case in this instance. Further that, any pending state action was brought in bad fath and intended to harass Appellees.

XVIII

HICKS V. MIRANDA IS NOT APPLICABLE IN THIS CASE

Hicks v. Miranda, 95 S.Ct. 2281 (1975) also is not applicable to this case for the same reason discussed above regarding *Trainor v. Huffman,* (supra).

That enjoining state proceeding did not interfere with the state resolution of difficult questions of state law nor the states efforts to establish coherent policy in a matter of public concern; in that Appellees constitutional rights were paramount to any state policy.

XIX

THAT ENJOINING STATE PROCEEDINGS DID NOT INTERFERE WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW

That in this case as in *Colorado River Water Conservation District v. United States,* 96 S.Ct. 1236 (1976), federal issues are involved and the Court found in the foregoing case that jurisdiction was proper where a federal issue was involved.

XX

THAT THE ISSUES PRESENTED DO CONSTITUTE A CASE OR CONTROVERSY

Appellants rely basically upon *Flast v. Cohen,* 88 S.Ct. 1942 (1968) for their contention that a case or controversy does not exist. *Flast* holds that the dispute sought to be adjudicated must be presented in an adversary context and in a form historically viewed as capable of

judicial resolution. The disputes here are clearly presented in such a context.

XXI

The District Court in issuing an injunction found that the Appellants would suffer immediate and irreparable harm and had no adequate remedy at law.

XXII

THAT THE STATE COURT HAD THE POWER TO APPOINT AN ATTORNEY AD LITEM

The state court had the power to appoint an attorney ad litem pursuant to § 11.10(c) of the Texas Family Code which states, "The Court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the child." Appointment of an attorney ad litem is proper in suits affecting the parent-child relationship being instituted by the state as there are three interests to be protected; those interests being that of the parents, the child and the state.

That it has long been established by the United States Supreme Court that minors have interests which are separate and individual and should be given constitutional protection, *In Re: Gault,* 87 S.Ct. 1428 (1967).

XXIII

That *Rizzo v. Goode* as relied upon by Appellants is not applicable in this cause as Appellees had and have a personal stake in the outcome of the action. *Baker v. Carr,* 88 S.Ct. 1953 (1962).

XXIV

THAT APPELLEES WERE SERIOUSLY INJURED BY THE CHILD ABUSE AND NEGLECT REPORT AND INQUIRY SYSTEM (CANRIS)

That the injury suffered by Appellees was actual, as Chapter 34 of Title Two (2), Texas Family Code (1974) violates constitutional guarantees in the following manner:

(a) a court order may be obtained without notice to the parents and without showing that the relief sought is necessary.

(b) the CANRIS procedure, violates due process by permitting an unbridled invasion of the family unit, *Sims v. State Department of Public Welfare* (supra) (p. 1191).

(c) CANRIS denied individuals due process during the investigative stage of state action.

(d) the procedure constituted an invasion of privacy and

(e) the Child Abuse and Neglect Report and Inquiry System (CANRIS), the use which, purported to be a clearinghouse of child-abuse information without the protection of the right of a judicial determination constituted an infringement of rights guaranteed to Appellees by the 14th Amendment of the United States Constitution.

XXV

That Appellants both implemented and executed a policy and statutes, which violated Appellees' constitutional rights in that Appellees were denied due process

by the Court's failure to appoint an attorney ad litem for the minor children. The state's summarily seizing the minor Appellees without notice to the adult Appellees; a timely hearing after seizure of the children; bad faith implementation of the state statutes by Appellants; failure of state to provide Appellees with a full adversary hearing at the expiration of the ex parte order that was issued; Appellants unjustified intrusion upon the family unit and invasion of the privacy interests of the family.

XXVI

The Federal District Court expressly found that Appellants implemented and executed the following sections of the Texas Family Code as to violate Appellees constitutional rights:

(1) That section 11.10 is unconstitutional on its face in so far as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

(2) That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

(3) That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under

Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

(4) That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

(5) That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

(6) That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

(7) That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

(8) That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

(9) That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided

for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

(10) That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

XXVII

That the actions taken by Appellants, under color of law, against Appellees are evidence of a governmental custom and policy which seriously injured Appellees and deprived them of constitutional rights. The requirements of *Rizzo v. Goode* (supra); *Monroe v. Pape*, 81 S.Ct. 473 (1961) and *Monell v. Department of Social Services of the City of New York*, ____U.S.____, 46 L.W. 4569 (June 6, 1978). Appellees reliance upon 42 U.S.C. 1983 was justified.

XXVIII

EQUITABLE RELIEF WAS PROPER AND THE CAUSE WAS NOT MOOT AT THE TIME OF THE HEARING ON THE MERITS

Equitable relief was proper in this cause as there was both an adequate showing of responsibility and causal connection between Appellants contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Dis-

trict Court in its decision of October, 1977, this cause was not moot at the time of the hearing on the merits.

XXIX

That in this case, just as the circumstances in *Roe v. Wade,* 93 S.Ct. 705 (1973), suits affecting parent-child relationship instituted by the State seeking conservatorship (custody) or termination "provides a classic justification for a conclusion of non-mootness". It could truly be "capable of repetition yet evading review," *Southern Pacific Terminal Company v. I.C.C.,* 31 S.Ct. 279, 283 (1911); *Carroll v. President and Commissioners of Princess Anne,* 89 S.Ct. 347 (1968). To say that, this cause should not have been litigated simply because the District Court returned the children during the pendency of this cause, would be one way in which the State could evade review of constitutional infringements within this area of law. The other two ways would be for the State itself to return the children or non-suit the case after persons filed suits seeking relief. In addition, the case in Montgomery County was still pending. The bad faith and harassment injury and threat of irreparable harm continued after the children were returned by the order of the Federal District Court.

XXX

The issues in this case not only involved possession of the children, but the denial of due process; unconstitutionality of the State statutes, deprivation of constitutional rights under the color of law, the integrity of the family unit, the interest of the parties and the right to privacy.

XXXI

APPELLEES RELIED UPON THE PROPER STATUTES

The statutes relied upon by Appellees were proper, as Appellants had actually under color of law and through governmental customs, implementation and execution of State statutes and policy violated Appellees' constitutional rights.

XXXII

THE STATE'S INTEREST IN THIS CASE DOES NOT JUSTIFY THE INFRINGEMENT UPON THE FUNDAMENTAL RIGHTS AND INTEREST INVOLVED HEREIN

The interest sought to be protected by the state in this instance does not warrant the infringement of Appellees' rights of family unity, due process, integrity, privacy and mutual association which are granted by the United States Constitution. Appellees acknowledge a legitimate state interest in protecting children, however, there was no compelling reason or interest that justifies the state's actions in a manner which contravenes basic constitutional principles as was done by the State in this case. The following is an overview of case law as to the constitutional interest at stake and how those interests are weighed when state intervention collides with various aspects of family law:

In *Meyer v. Nebraska,* 43 S.Ct. 625 (1923), where the Supreme Court found the right of parents to have their children study the German Language was a protected First Amendment right, stating, at p. 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. *Without doubt,* it denotes not merely freedom from bodily restraint but also . . . *the right . . . to marry, establish a home and bring up children . . .*" [Emphasis added.]

In *Pierce v. Society of Sisters,* 45 S.Ct. 571 (1925), the Court stated that the right to educate one's children as one chooses was made applicable to the States by force of the First and Fourteenth Amendments, and the Court stated:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . the child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . [and] duty to recognize and prepare him . . ."

In *Skinner v. Oklahoma,* 62 S.Ct. 1110 (1942), recognized the rights to marry and procreate as "basic civil rights of man," and struck down a state statute authorizing sterilization of habitual criminals.

In 1943, faced with a situation of State intervention as *parens patriae* involving the welfare of children in *Prince v. Massachusetts,* 63 S.Ct. 438 (1943), the Supreme Court held:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply or hinder

> * * * and it is the recognition of this that these decisions (*Meyer* and *Pierce*) have respected the private realm of family life which the state cannot enter." 63 S.Ct. 438 (1943).

May v. Anderson, 73 S.Ct. 840 (1953), held a parent's "immediate right to the care, custody, management and companionship of . . . minor children" to be "one of the most precious of personal liberties."

Stanley v. Illinois, 92 S.Ct. 1208 (1972), struck down an Illinois dependency and neglect statute which deprived unmarried fathers of the care and custody of their natural children upon death of their mothers, holding that the right of parents to have custody and management of their children is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment.

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious than property rights.' It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." [Citation omitted.] 73 S.Ct. 840 (1953).

Roe v. Conn, ____U.S.____ (M.D. Ala., decided July 6, 1976) cites and follows *Alsager v. District Court of Polk County, Iowa,* 406 F. Supp. 10 (8th Cir. 1975),

and is the most recent decision known to Appellees dealing with the fundamental freedoms of the parent-child relationship:

> "A district court in Iowa recently reviewed the long line of Supreme Court cases addressed to the constitutional interests at stake where various aspects of family life are threatened and concluded there is a fundamental right to family integrity protected by the Fourteenth Amendment to the United States Constitution." *Alsager v. District Court of Polk County, Iowa,* (supra).
>
> A more recent Supreme Court decision, *Cleveland Board of Education v. LaFleur,* 94 S.Ct. 791 (1974), reaffirms the constitutional nature of this interest: 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' In addition to the 'liberty' concept of the Fourteenth Amendment, the Supreme Court has been equally solicitous of the family enclave under the doctrine of privacy. See *Griswold v. Connecticut,* 85 S.Ct. 1678 (1965); *Eisenstadt v. Baird,* 92 S.Ct. 1029 (1972); *Roe v. Wade,* 93 S.Ct. 705 (1973) . . .

XXXIII

DUE PROCESS REQUIRES AN EMERGENCY EX PARTE HEARING WITHIN TWENTY-FOUR HOURS AFTER TAKING POSSESSION OF A CHILD

The Federal District Court stated the following in determining when an adversary hearing should be held:

> Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency. An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.
>
> Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard. After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the Court.
>
> Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this Court assumes to be

legislative oversight, the hearing is "to provide for the temporary care or protection of the child"—language which assumes that such care of protection is needed.

It is Section 17.05 and 17.06 that are fraught with constitutional defects. After the State takes emergency custody of the child and there had been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and instead, places a clearly unconstitutional burden on the parent, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05(b)(2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process. *Sims v. State Department of Welfare* (supra) (p. 1192 and 1193). ——

XXXIV

The Federal District Court Amended Judgment states "That Section 17.03 is unconstitutional on its face insofar

as it fails to require the state to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of the child is taken by the State." A copy of the Court's amended judgment is included herein and marked exhibit A-5 (emphasis by Appellee).

That it is clear by Appellants' own admissions and exhibits as well as a conference which was held in the chambers of the Honorable John V. Singleton, Jr., United States District Judge, in January of 1978, that an immediate hearing was deemed to mean within twenty-four hours. The following of Appellants exhibits all found in Volume I and II of Appellants' Appendix to The Jurisdictional Statement are evidence of that fact:

(1) A-52, a copy attached and marked exhibit B (emphasis added by Appellees)

(2) A-54, a copy attached and marked exhibit C (emphasis added by Appellees)

(3) A-55, a copy attached and marked exhibit D (emphasis added by Appellees)

(4) A-56, a copy attached and marked exhibit E (emphasis added by Appellees)

(5) A-57, a copy attached and marked exhibit F (emphasis added by Appellees)

(6) A-58, a copy attached and marked exhibit G (emphasis added by Appellees)

(7) A-59, a copy attached and marked exhibit H (emphasis added by Appellees)

(8) A-74, a copy attached and marked exhibit I (emphasis added by Appellees)

(9) A-81, a copy attached and marked exhibit J (emphasis added by Appellees)

(10) A-82, a copy attached and marked exhibit K (emphasis added by Appellees)

(11) A-91, a copy attached and marked exhibit L (emphasis added by Appellees)

(12) A-98, a copy attached and marked exhibit M (emphasis added by Appellees)

(13) A-107, a copy attached and marked exhibit N (emphasis added by Appellees)

(14) A-115, a copy attached and marked exhibit O (emphasis added by Appellees)

XXXV

DUE PROCESS REQUIRES THE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD BEGINNING AT THE EMERGENCY EX PARTE HEARING

Due Process does require appointment of an attorney ad litem for a child beginning at the emergency ex parte hearing. That to require the appointment of an attorney for the child within the 24 hour ex parte hearing in all suits affecting the parent-child relationship in which the State is a party, would not be impossible, nor would such an appointment be burdensome, as the child's interest is separate and distinct from that of the parents or Appellants (the State). The child's interest and rights

must be protected from the beginning of the judicial process. The prompt appointment of an attorney ad litem assures protection of these interests and rights. This Court has recognized the need for protection of rights of minors from the beginning of the judicial process. *In Re: Gault,* (supra); *Roe v. Conn.,* 417 F. Supp. 769, 780 (M.D. Ala. 1976). As stated by this Court in *Powell v. Alabama,* 53 S.Ct. 55 (1932) p. 68, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

XXXVI

CLEAR AND CONVINCING EVIDENCE IS THE PROPER STANDARD OF PROOF

The proper standard of proof in suits affecting parent-child relationship where the state is the movant should be clear and convincing evidence while such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship,* 90 S.Ct. 1068 (1970), the fundamental and essential right to family integrity requires at the very least that the state notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa,* (supra). As summarized in the earlier discussion of family integrity, the right of a familial relationship and protection of that relationship is fundamental." *Alsager v. District Court of Polk County,* (supra); *Roe v. Connecticut,* (supra); *Stanley v. Illinois,* (supra); *Prince v. Massachusetts,* (supra); *Pierce v. Society of Sisters,* (supra); *Meyer v. Nebraska,* (supra); *May v. Anderson,* (supra); *Levy v. Louisiana,* 88 S.Ct. 1509 (1968); *Gloria v. American Guaranty and Liability Insurance Co.,* 88 S.Ct. 1515.

The fundamental rights involved in termination cases and suits affecting parent-child relationships are equal to and of the same import as rights of Juveniles involved in *In Re: Gault,* (supra). The cases cited above show, that once a right has been deemed to be "fundamental," the Court then affords to the parties the utmost of due process, which would demand at least, a standard of proof consisting of clear and convincing evidence. The retention of a preponderance of the evidence as the standard of proof rather than requiring that a showing be made by clear and convincing evidence in suits to terminate or affect parental rights where the State is the Moving Party, would constitute a denial of Due Process as required by the 14th Amendment of the United States Constitution.

WHEREFORE, PREMISES CONSIDERED, Appellees pray this Honorable Court to affirm the decision of Honorable John Ingraham, Honorable John V. Singleton, Jr. and the Honorable Ross N. Sterling, SITTING AS A THREE JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISRICT OF TEXAS, HOUSTON DIVISION and to dismiss Appellants Appeal therefrom.

Respectfully submitted,

Windell E. Cooper Porter

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Motion to Affirm have on this the 29th day of September, 1978, been sent by United States Postal Service, Certified Mail, Return Receipt Requested, to the following:

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

STEVE BICKERSTAFF
Assistant Attorney General

DAVID H. YOUNG
Assistant Attorney General

Attorneys for Appellant

P. O. Box 12548, Capitol Station
Austin, Texas 78711
AC 512 - 475-4368

EXHIBIT A-1

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 76-H-665

JOHN PLEASANT SIMS, ET AL.,
Plaintiffs,

v.

RAUL JIMENEZ, ET AL.,
Defendants

Civil Action No. 76-H-1120

DOROTHY MAE WOODS, ET AL.,
Plaintiffs

v.

RAUL JIMENEZ, ET AL.,
Defendants

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

_____/s/_____
JOE INGRAHAM
Senior United States
Circuit Judge

_____/s/_____
JOHN V. SINGLETON, JR.
United States District Judge

_____/s/_____
ROSS N. STERLING
United States District Judge

APPROVED AS TO FORM:

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By _____
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Attorneys for Plaintiffs Woods, et al.

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Attorney General of Texas
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By _____/s/_____
C. J. Carl
Assistant Attorney General

Attorneys for Defendants

requires more quantity and/or quality of evidence and requires proof to a more certain degree than the "preponderance of the evidence" standard.

TOPIC IV — ATTORNEY AD LITEM

Social Services Handbook Item 7324, (Texas Family Code, Section 11.10)

The Court found Section 11.10 of the Texas Family Code unconstitutional since it did not require an attorney ad litem to be appointed to represent the child in all suits affecting the parent-child relationship under Chapters 14, 15, and 17 of the Texas Family Code in which DHR protective services staff sought conservatorship or termination of the parent-child relationship. In these situations, the Court found the child's interest to be generally distinct from and adverse to interests of either the State (DHR) or the parents. Since these interests are separate and competing, the child deserves the constitutional protection of representation by an attorney ad litem at all such proceedings. The Sims Court stated that the court trying the suit must require the parents to pay for the child's representation, if they are able to do so.

The Court declined to rule on the parents' right to a court-appointed attorney when the parents could not afford the services of an attorney. The issue of whether indigent parents have a right to court appointed counsel is still pending in a suit before another court.

The implication for the Department of the requirement that an attorney ad litem be appointed for the child will lie primarily in drawing the court's attention to this litem. This is a difficult issue since the courts may lack funds to pay for attorneys ad litem when the parents cannot, and the attorneys ad litem must be obtained for all hearings, *including the 24-hour hearing under* Chapter 17.

The Court was careful to point out that the State's (DHR's) interest in the protection of the child is not endangered by the requirement for a hearing because of the existence of Section 34.05(d), Texas Family Code, which allows for emergency protection under Chapter 17, Texas Family Code. That is, if these examinations are required to protect a child in an emergency, the Department may take emergency custody of the child and consent to the examinations after the 24-hour hearing (see Topic VI below).

Requiring an adversary hearing before seeking psychological or psychiatric examinations of children when parents refuse to consent to them will probably have minimal implications for the Department because of the following factors:

1. The Department seldom seeks psychological or psychiatric examinations under these circumstances because they are seldom needed to protect children from death or permanent harm.
2. If the child is in a situation of immediate danger to his physical health or safety, the Department can seek managing conservatorship to obtain the right to consent to the examination. (See paragraphs on ex parte court ordered removal and emergency removal under Topic VI below). However, this will require more drastic action than the Department has formerly been required to take.

Requiring an adversary hearing before seeking physical examinations of children when parents refuse to consent to them has considerable implications for the Department in attempting to protect children. Although ex parte court-ordered physical examinations are not frequently sought during the investigation, they are always sought when the child appears to be in

danger of possible death or permanent harm and the parents refuse to allow physical examination and treatment. Under Sims, to obtain the examination, the Department must wait until an adversary hearing can be held and thus leave the child in potential danger for a period of time, or the Department must obtain conservatorship for the purpose of consenting to the examination, which involves as much or more of an intrusion into the family's privacy and parental rights than previously required by an ex parte court order for the examination.

TOPIC VI—EMERGENCY REMOVAL

Social Services Handbook Item 7330, (Texas Family Code, Section 17.01 et seq)

The Court recognized the interest of the State (DHR) in protecting children from abuse and neglect as quickly as possible. The Court approved the current language in Section 17.01, Texas Family Code, that allows DHR to take custody of a child to protect him from an immediate danger to physical health or safety. However, the Court found that Sections 17.02, 17.03, 17.05, and 17.06 violated parents' constitutional rights by not requiring that the Department:

1. Make every reasonable effort to serve notice on the parents that a hearing on the removal will be held within 24 hours after removal.
2. Hold an adversary hearing within 10 days of removal, with service of citation and notice to the parents is continued custody is sought.

Before removing a child in an emergency, the Department must consider the following courses of action in the priority of their listing. The worker and supervisor must document the reasons why a court

____n earlier on the following list is not taken before ____g one later on the list.

1. **Court-ordered removal** — Remove the child pursuant to a written court order which is based on a Chapter 14 or 15 suit filed by DHR and which is issued following an adversary hearing.
2. **Ex parte court-ordered removal** — Remove the child pursuant to a written ex parte court order, which is based on a Chapter 14 or 15 suit filed by DHR and which is issued under the authority of Section 11.11(a)(4). An adversary hearing must be scheduled within 10 days after the date of the court order and the parents served with citation and notified of the hearing. The ex parte order must be a written order; it cannot be a verbal order.
3. **Emergency removal** — Remove the child pursuant to Chapter 17 without a court order, with an ex parte hearing to be held within 24 hours after removal. An adversary hearing must be scheduled within 10 days after the date of removal and the parents served a citation and notified of the hearing. This ex parte order must be a written order; it cannot be a verbal order.

DHR defines emergency removal as removal of a child from his home or other place where he is receiving care without written parental consent and before a court order is obtained. **Emergency removal can be made only as a last resort in protecting a child. Emergency removal can be made only when all of the following factors can be documented:**

1. The child is in a situation which is of immediate danger to his physical health or safety. Immedate physical danger does not include emotional, potential, non-emergency, or non-physical abuse/neglect.

2. Ex parte court-ordered removal procedures cannot be carried out in sufficient time to protect the child from physical harm. That is, the worker has reasonable evidence, which he can verify and document, that the child would suffer physical harm between the time the worker could leave the child and the time he could return with the ex parte court order authorizing removal.
3. Available resources to protect the child in his home have been considered and found to be insufficient. Examples of these resources are emergency homemaker, protective day care, a relative or neighbor staying with the child in the home, or other similar types of resources.

If the worker and supervisor decide within the scope of the above factors that emergency removal of a child from his home is necessary, a law enforcement officer or Investigation Division staff person must accompany the worker when the child is removed from the home. If neither is available, the reason must be documented in the file and the concurrence of a social services program director must be obtained to authorize the child's removal. In addition, a protective service supervisor or another worker or DHR employee must accompany the worker when the child is actually removed. The person who accompanies the worker *should attend the 24-hour* hearing. If the worker was not accompanied by a law enforcement officer or Investigation Division staff person, the worker or supervisor must report the circumstances of the removal to the regional director for *social services within 24 hours of the removal.*

The Texas Family Code stipulates that the worker may remove a child without civil liability if the worker has reasonable cause when he removes the child to believe there was an immediate danger to the child's physical

safety (Texas Family Code, Section 17.09). The worker must verify whatever gave him "reasonable cause" to believe the child was in immediate danger and must document his verification in the case record.

All of the following steps must be taken after removing a child from his home under Chapter 17:

1. DHR must make every reasonable effort to serve notice on the parents. When the parents can be located, the worker must inform the parents orally or in writing that a hearing will *be held within 24* hours, that they have the right to obtain the services of an attorney to represent them at that hearing, and of the location of the district court where the hearing will be held. DHR must document its efforts to inform the parents and should try to verify its efforts with witnesses.
2. Immediately after removal, DHR must bring the child physically before the court. (The Sims opinion states that "immediately" *means within 24 hours of* actual removal, "barring unusual circumstances," which it did not define.) A petition must be filed at or before the time the child is delivered to the court and a hearing is held. This means that district judges, county/district/criminal district attorneys, children's attorneys ad litem, Investigation Division or law enforcement staff, and DHR workers must be available seven days a week and 365 days a year to participate in Chapter 17 emergency removal proceedings.

   Oral authorization from the judge to remove the child cannot substitute for or eliminate the need *for the 24-hour hearing required under the* Sims judgment.

   If the hearing cannot be held because the district judge or county/district/criminal district attorney

cannot attend, the worker must return the child to the home and provide whatever services are possible to protect the child from death or other permanent physical harm. In these instances, the worker must inform in writing the district judge, county/district/criminal district attorney, local law enforcement officials, the regional attorney, and the regional director for social services of the child's circumstances. The danger to the child must be clearly stated.

3. Before or at the *24-hour hearing,* DHR must file a Chapter 17 suit by and through the county/district/criminal district attorney and pursuant to Section 17.02, Texas Family Code. If evidence of the child's needs indicates possible need for continuing custody past the 10-day order, DHR should ask the county/district/criminal district attorney to join a Chapter 14 or 15 suit with the Chapter 17 suit. If the Chapter 17 suit is not filed in the county of the child's residence, a petition under Chapter 14 or 15 must be filed in the court of continuing jurisdiction. This should be done as soon as possible during the 10-day emergency order.
4. *Before or at the 24-hour hearing,* the court must appoint an attorney ad litem for the child.
5. *At the 24-hour hearing,* the court must determine whether the child is without support and is dependent on society for protection or is in immediate danger of physical injury, as set out in Section 17.04, Texas Family Code. If the court finds that the child is in either situation, the court may issue a 10-day emergency order (dating from the time of actual removal), naming the Department as temporary managing conservator. If the parents are present *at the 24-hour hearing,* they should be served while there with citation, including a copy of

provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse and neglect reports pending appeal would cause irreparable harm to Defendants unless the stay is granted and would cause substantial harm to the public interest by inhibiting the state's ability to gather information about and investigate suspected cases of child abuse.

3. That to apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Defendants and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect.

4. That to require the appointment of an attorney ad litem for a child in all suits affecting the parent-child relationship in which the State is a party, especially as early as the *one-day or 24-hour ex parte* hearing, would be impossible since the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code.

5. That to require notice and hearing to parents prior to authorizing under Section 34.05(c) of Title 2 of the Texas Family Code physical examinations of children who are abused or neglected would dangerously delay treatment to children who are in need of emergency medical attention.

The grounds upon which Defendants' appeal will be based are substantially as stated above and for the reasons stated, Defendants respectfully request a stay of

substantial harm to the public interest by inhibiting the State's ability to gather information about and investigate suspected cases of child abuse. Note that the information in question is not disseminated to, or even available to, the general public or anyone else other than certain selected staff of Petitioners who are directly involved in investigating alleged abuse.

(b) To apply the standard of clear and convincing evidence to the State in suits affecting the parent-child relationship in which the State is a party instead of the standard of a preponderance of the evidence currently set out in Section 11.15 of Title 2 of the Texas Family Code would cause irreparable harm to Petitioners and to the public interest since this standard would place an improper and excessive burden on the State when it institutes proceedings to protect children from abuse and neglect. Such a "higher" standard could also be used to overturn previously valid terminations, and subsequent adoptions, directly contrary to the best interests of the children involved.

(c) To require the appointment of an attorney ad litem for a child in each suit affecting the parent-child relationship in which the State is a party as early as the *one-day or 24-hour ex parte hearing would cause* irreparable harm to Petitioner. Such appointment is not only impossible as to Petitioners because the State is not authorized to make expenditures for such appointments and no funds have been appropriated for such appointments under Section 11.10 of Title 2 of the Texas Family Code, it is further inappropriate since such ex parte hearing is nothing more than the equivalent of a temporary restraining order hearing.

(d) To require an emergency hearing to be held under Section 17.02 of Title 2 of the Texas Family Code within one day or 24 hours of seizure of a child in

emergency circumstances, without regard to whether the next day is a scheduled work day, would cause irreparable harm to Petitioners because to do so would always be impossible in some rural areas of the State, and frequently impossible in even urban areas of the State when a district judge was not available within 24 hours or could not hold the one-day or 24-hour hearing on the weekend.

6. Moreover, the Petitioners will be appealing the decision on the basis that the District Court should have abstained under the comity and federalism principles set out in *Younger v. Harris,* 401 U.S. 37 (1971); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Juidice v. Vail,* 97 S.Ct. 1211 (1977); and *Trainor v. Hernandez,* 97 S.Ct. 1911 (1977).

7. The abstention doctrine, as well as the Court below's massive interference with the State's judicial processes cause Petitioners to request a stay of the judgment in its entirety. However, should this Court believe a stay of the entire judgment is not appropriate, Petitioners implore the Court to stay the judgment of the District Court in so far as it holds that the Petitioners are bound to return endangered children to potentially life threatening or other physically endangering situations because a state district judge fails to hold an ex parte hearing or appoint an attorney ad litem within one day or 24 hours of seizure, regardless of the availability of such a judge or whether an ex parte *hearing is not held literally within 24 hours of the removal of the child(ren) from physically hazardous circumstances.*

WHEREFORE, Petitioners pray that the judgment of the United States District Court for the Southern District, Houston Division, or at least the certain above set forth portions of it, be stayed pending appeal and a final determination of the matter by this Court.

EXHIBIT L

District Court's holdings. However, this instant application seeks a stay only of the most egregious invasion of the operation of the state's judicial system.

While approving the statutory basis upon which the emergency seizure of a child may take place, the court below held that the initial statutorily mandated hearing was constitutionally defective in not being required to be held "immediately." In describing the due process standard it was imposing, the District Court said, "Barring unusual circumstances, . . . this ex parte presentation to a judicial authority [may not be held] beyond the very day of seizure." If there had been any doubt that this language means that the emergency hearing must be held within 24 hours of the time a child is taken into possession, the managing judge resolved it at a conference with counsel for all parties in his chambers in January 1978. After the Judgment was entered, Defendant Commissioner Jerome Chapman so advised all field staff in Executive Letter 78-5, a copy of which is attached as Exhibit E.

The reaction of state district judges, who have jurisdiction over emergency suits under Chapter 17, as well as other actions pursuant to Title 2 of the Texas Family Code, is evidenced by the letters and orders from Judges Cole, Hester, Shackleford, Moore, and Gibson, copies of which are attached as Exhibits F, G, H, I, and J, respectively. Clearly child protective service workers do not have it within their power to compel compliance with the federal district court's insistence that the emergency ex parte hearing be held within 24 hours of removal. If no state district judge is able or willing to conduct the required hearing on a weekend, keeping possession of a child subjects a worker to the risk of a suit for damages by the parents. But to return a child removed from a life-threatening or otherwise physically endangering situation would subject the worker at least to contempt proceedings by state district judges.

EXHIBIT M

"meant within 24 hours and subject to no general exceptions (such as weekends or legal holidays). Since we think the reasonable requirements regarding holding this ex parte hearing would be to have it the next scheduled workday, I would be pleased to learn that I misunderstood him.

Thus, we are appealing both the standard of proof holding and the failure to take into account the normal work week when establishing the constitutional standard for holding the equivalent of a TRO hearing (the immediate ex parte hearing under Chapter 17). As you may know we are also planning to appeal the holding regarding CANRIS and the requirement that the attorney ad litem for the child be appointed as soon as the immediate ex parte hearing (which is analogous to a TRO hearing), an aspect which is not explicitly stated in the memorandum opinion, but which Judge Singleton explained at the conference in his chambers in January.

Finally, with regard to your proposed order concerning the physical presence of the child at the immediate ex parte hearing, I do not have any disagreement. Though the memorandum opinion of the United States District Court in the subject case seems to assume physical delivery, it certainly does not mandate it. Thus, I think your proposed order represents the proper and reasonable approach.

Sincerely,

C. J. Carl
Assistant Attorney General

CJC/fd

EXHIBIT N

A-107

EXHIBIT G

March 29, 1978

Mr. Jerome Chapman
Commissioner
Texas Department of Human Resources
John Reagan Building
Austin, Texas 78711

Re: John Pleasant Sims, et
v. Raul Jimenez, et al

Dear Mr. Chapman:

I recently received from the Attorney General's Office a copy of your Executive Letter of March 1, 1978, No. 78-5, setting out procedures for the Department of Human Resources to follow in an effort to comply with the holding in *Sims*.

At that time I made a mental note of the following language:

> "Make every reasonable effort to serve notice on the parents *that a hearing on the removal will be held within twenty-four (24) hours after removal.*"

My thoughts at the time were that the underlined portion above was a matter wholly beyond the control of the DHR representative and would soon present problems. I and my brethren on the bench are rather jealous of our prerogatives as to the setting of hearings within our courts and the above language presumes that the taking of a child into custody by the DHR representative will somehow automatically convene a district court and work a setting without consulting the court.

EXHIBIT O

A-115

April 25, 1978

The Honorable Darrell Hester
District Judge
One Hundred Ninety Seventh
District Court
Brownsville, Texas 78520

Dear Judge Hester:

Thank you for your recent letter outlining your concerns regarding this department's interpretation of the holding in *Sims*. I appreciate and share your concerns.

The drafting of Executive Letter No. 78-5 was an undertaking that consumed a considerable amount of time, a great deal of review and numerous revisions. It represented the combined input of program staff, in-house counsel, and representatives of the Attorney General.

This department does not agree with all of the holdings in the *Sims* decision. We recognize and support judicial prerogative as to the setting of hearings in your court. However, I am sure you understand that it was necessary to send instructions to our staff concerning the Federal Court's judgment.

The discussion of the requirement for an ex parte hearing in the Executive letter which you referred to as the "24-hour rule", was developed with the assistance of the Attorney General's Office.

Supreme Court, U. S.
FILED
DEC 13 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

* * *

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,
Appellants

vs.

JOHN PLEASANT SIMS, ET AL.,
Appellees

* * *

APPELLANTS' BRIEF ON THE MERITS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS RESPECTIVELY, OF THE TEXAS BOARD OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; GENE LEGE, INDIVIDUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE MONTGOMERY COUNTY WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Appellants,

vs.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

* * *

APPELLANTS' BRIEF ON THE MERITS

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Appellants, Hilmar G. Moore, et al., respectfully submit this their Brief on the Merits.

OPINION BELOW

The opinion of the three-judge District Court for the Southern District of Texas, Houston Division is reproduced in Appendix, page 61, and is reported at 438 F.Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

On April 19, 1976, this suit was brought under 42 U.S.C. §§ 1981 and 1983 and under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Pursuant to 28 U.S.C. §§ 2281 and 2284, as they then existed, a three-judge court was convened to determine the constitutional issues raised by Plaintiffs. The Amended Judgment of the District Court (A. 100) was entered on March 8, 1978. Notice of Appeal (A. 106) was filed in the District Court on April 20, 1978, pursuant to 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

The applicable statutes are set out in Appendix I, Volume II, p. A-131 and Appendix J, Volume II, A-182, of Appellants' Jurisdictional Statement.

QUESTIONS PRESENTED BY THE APPEAL

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

II. WHETHER A CASE OR CONTROVERSY EXISTED

A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD LITEM, WERE NEVER ASKED TO DO SO, NEVER REFUSED TO DO SO, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT ONE BE APPOINTED

B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES' TIMELY HEARINGS

E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER,

OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM, FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

STATEMENT OF THE CASE

In this litigation Appellees, John and Mary Sims, contend that major portions of Title 2 of the Texas Family Code which are designed to protect children from abuse and neglect are unconstitutional infringements of family integrity. Appellants, officers and employees of the Texas Department of Human Resources (formerly the State Department of Public Welfare) received on March 25, 1976, a report of physical abuse to a child, Paul Sims, and dispatched a worker, Rex Downing, to investigate the report. (*Sims*, A. 65.) Mr. Downing found visible physical injury to eight-year-old Paul and learned that the injuries were inflicted when Mr. Sims came to Osborne Elementary School in Houston, Texas, where Paul was a student, and beat the child. (Deposition of Rex Downing, p. 58; Sworn Statement of Dr. Marie L. Surgi, p. 43.) The boy had

also been spanked on the previous night by Mrs. Sims. (Deposition of Mary Louise Sims, p. 23.)

In order to protect Paul and his two young sisters from further harm and to determine the extent of their injury, the Department took the children into temporary custody and had them examined by a physician. (Deposition of Rex Downing, p. 15.) The doctor found all three children were battered. Paul was injured to such an extent that he had to be admitted to St. Joseph's Hospital where he was treated for eleven days. (Sworn Statement of Rex Downing, pp. 44 and 55; Sworn Statement of Dr. Marie Surgi, p. 44.)

After taking protective custody of the children, Mr. Downing met with supervisory personnel at the Department that afternoon; the group decided that a suit for protection of a child in an emergency under Section 17.02 of the Code should be filed in Houston, Harris County, Texas, where the children were found. The suit was filed in the District Court of Harris County on March 26, 1976, the day after the children's removal. Judge Robert Lowry issued an emergency ex parte order appointing the Department temporary custodian of the children. (*Sims*, A. 66.) Section 17.04 provides for these emergency orders. The statute does not require service on the parents at this emergency stage of the proceedings, Section 17.03, and none was made. The Sims had actual knowledge of the suit and retained an attorney on the day the suit was filed. (Sworn Statement of Rex Downing, pp. 38-40.)

On March 31, 1976, the Sims appeared personally and through their attorney who submitted a motion to modify the order. A hearing on such a motion is statutorily mandated, but Judge Lowry was temporarily absent. Therefore, the motion was not filed by the court clerk; rather, it was returned to the Sims attorney. Instead of pursuing a hearing on the motion, the Sims filed a petition for a writ of habeas corpus. At a

hearing on the habeas petition held April 5, 1976, Judge Lowry determined that the children were residents of Montgomery County, Texas, and verbally transferred the proceedings to the district court in Montgomery County. The Sims' attorney pursued that habeas action no further. (*Sims*, A. 66-67.)

The Department, seeking continued custody of the children so that further investigation and work with the family could be done prior to any disposition of the case, filed a suit affecting the parent-child relationship in Judge Lowry's court that afternoon. The judge issued a temporary restraining order continuing temporary custody in the Department and transferred the suit to Montgomery County where the children resided and continuing jurisdiction lay. *See* Sections 11.04, 11.05, and 11.06 of the Code. (*Sims*, A. 67.)

The Sims and their attorney had actual knowledge that the court had decided that the children resided in Montgomery County and that any suit affecting their relationship to their parents was in the continuing jurisdiction of that court. (Deposition of Gladys R. Goffney, p. 29.) The Sims' attorney was notified that the suit was pending in Montgomery County and that a hearing had been set for May 8, 1976; citation was not issued. (Deposition of Rex Downing, p. 42.) At no time did the Sims ask for an earlier hearing or seek mandamus directing a hearing.

On April 19, 1976, the Sims filed this cause in the United States District Court for the Southern District of Texas, Houston Division. The Sims' application for a temporary restraining order in their cause in the federal district court was denied by Judge John Singleton on April 20, 1976. A hearing on their application for a temporary injunction was set for April 29 (Order of April 20, 1976) and later reset for May 5. When the Department received notice on April 22, 1976, of the suit in federal district court, State court proceedings were

suspended foreclosing the Department's opportunity to resolve the matter. The Sims returned to State court and filed on May 4, 1976, a motion for leave to file an original petition for writ of habeas corpus with the Court of Civil Appeals of the State of Texas, Fourteenth Supreme Judicial District. The motion was denied for want of jurisdiction. (*Sims*, A. 67-68.)

At the hearing on May 5, Federal District Judge Singleton found the children were not legally in the Department's custody because the temporary orders issued by the State court had expired by operation of law. *See* Sections 17.04 and 11.11(b) of the Code and Rules 680 and 681 of the Texas Rules of Civil Procedure. Judge Singleton ordered the children returned immediately to their parents and determined that the Department was *not* enjoined from taking proper action to gain custody of the children. (*Sims*, A. 68.)

The Department filed a new suit in Montgomery County on May 14 seeking custody of Paul Sims. (*Sims*, A. 68.) Under this new suit, Judge Ernest Coker, Sr., issued a show cause order and a writ of attachment ordering that Paul Sims be delivered to the temporary care of his maternal grandparents (by adoption), Mr. and Mrs. James Carter. A show cause hearing was set for May 21, but the Sims avoided service of citation and attachment by absenting themselves from residence, school, and place of employment until May 21. The hearing was reset for June 21. (Sworn Statement of Carol Jones, pp. 30-33.)

Meanwhile, the Sims filed a second application for a temporary restraining order in federal district court without notice, actual or otherwise, to the Department, and this time Judge Singleton issued, in apparent violation of Rule 65(b)(2), Fed. R. Civ. P. and 28 U.S.C. §§ 2281 (repealed Aug. 12, 1976) and 2284(3), an ex parte order forbidding the attachment. (Temporary Restraining Order of May 5, 1976.) When the requested

three-judge court was constituted, a hearing was held on June 7. At the hearing, a preliminary injunction which prohibited further proceedings in State court pending a final hearing on the merits in federal district court was issued. (*Sims*, A. 68.) Trial on the merits on October 26, 1976, resulted in judgment for the Sims. (A. 100.)

SUMMARY OF THE ARGUMENT

Principles of equitable restraint and comity required abstention by the federal district court. All proper constitutional issues could have been raised in State court. The injunction ordered by the federal district court interfered with the State's enforcement of statutes designed to protect the same interests which underlie its criminal law. Further, by enjoining this suit brought by the State in its sovereign power, the federal district court reflected negatively on the State courts' ability to adjudicate federal claims. Finally, suit was filed in State court before any substantive action had taken place in federal court.

The federal district court did not have jurisdiction of this litigation because no case or controversy existed between the Sims and the Department. The Department was an improper party against whom to raise issues concerning the appointment of an attorney ad litem. It had no power to appoint such an attorney, was not asked to appoint one, and never refused to do so. The Department's request that the federal district court appoint an attorney ad litem was denied. The Sims were not injured by the child abuse reporting system since the information collected was never disseminated and any alleged threat of future injury was so remote as to be mere conjecture. The preponderance standard of proof required by State statute in cases involving termination of parental rights was never applied to the Sims. The Department neither controlled the State court's docket nor caused delay of any hear-

ings in this case. Issues involving custody of the Sims' children were moot since the federal district court returned the children to the Sims long before proceedings on the merits in this cause began. Moreover, since the Sims did not establish a case or controversy, jurisdiction could not be conferred by the federal statutes upon which they relied.

State statutes attacked by the Sims comport with constitutional requirements. Any disruption of the Sims' privacy is constitutionally permissible because of the State's compelling interest in protecting children's welfare and the child's right to be free from serious injury. The State's compelling interest in protecting children's personal right to be free from serious injury by adults, which underlies child abuse statutes, outweighs the necessary and reasonable infringement on parents' rights. The federal district court's holding that a hearing must be held on the "very day" of emergency removal of children from their parents is unreasonable and exceeds due process requirements. The standard of proof in cases involving termination of parental rights is preponderance of the evidence which meets due process requirements and is the only standard used by lay factfinders in any civil litigation in Texas.

ARGUMENT

I. WHETHER EQUITABLE RESTRAINT AND COMITY REQUIRED ABSTENTION

The long-established rule that federal courts will not enjoin state court proceedings controlled in the instant case and required abstention. *Younger v. Harris*, 401 U.S. 37 (1971). Standards of equitable restraint when federal courts are requested to interfere with state court civil functions go far beyond the stringent standards of private equity jurisdiction. *Huffman v. Pursue*, 420 U.S. 592, 603 (1975). In addition to finding

that a federal plaintiff has no adequate remedy at law and will suffer great and immediate irreparable injury if equitable jurisdiction is denied, the federal court must consider ideas of comity which are basic to our federalism. Comity posits that the national sovereign fares best when the states and their institutions are left free to perform their separate functions. *Huffman, supra*, at 601; *Younger, supra*, at 44. The balance struck between state and federal courts is especially delicate when the federal court is asked to declare a state statute unconstitutional. Even a showing that a statute on its face violates rights protected by the Constitution will not justify a federal injunction to prevent a state's good faith attempts to enforce its constitutionally infirm statute. *Huffman, supra*, at 602; *Younger, supra*, at 49 and 53; *Watson v. Buck*, 313 U.S. 387 (1941). Absent a showing of bad-faith prosecution or harassment by the state in bringing suit or some equally egregious and extraordinary circumstances which will result in irreparable damage to the person being sued by the state, a federal court wrongfully exercises its equity jurisdiction to enjoin state court proceedings. *Younger, supra*, at 54.

This case is a classic example of what can happen when federal courts do not accept the seriousness of the consequences which result from interference with state civil functions. In *Huffman, supra*, at 603, this Court said that "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence."

In *Huffman* the Supreme Court refused to confine the doctrine of restraint promulgated in *Younger* to state criminal proceedings. Although the Court in *Huffman* was not required to decide whether the doctrine of judicial restraint would be applicable to all civil lit-

igation, it is clear that *Huffman* extends the considerations of comity and federalism to state civil litigation. These principles are particularly relevant to litigation such as that involved in this case, litigation which sought to allow the State to take prompt action on a matter involving the health and safety of a child who had been subjected to severe physical abuse. (*See* Defendants' Exhibits 6 and 7, A. 55.)

Huffman established the rule that federal courts should apply the principles of comity and federalism to both pending state court proceedings which are in the initial stages of adjudication as well as those which are making their way through the state appellate process. The decision also notes that civil litigants may seek review in the Supreme Court of any federal claim properly asserted in and rejected by state courts.

This Court, in *Huffman*, has noted that a federal district court may intervene in those cases where it *properly finds* that the state proceeding is motivated by a desire to harass, or is conducted in bad faith, or where the challenged statute is ". . . flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." By no stretch of the imagination can these standards be met in this case, and the opinion of the court below shows on its face that they were not.

I. A. ENJOINING PENDING STATE PROCEEDINGS FORECLOSED OPPORTUNITY TO GO FORWARD WITH A SUIT IN WHICH ALL PROPER ISSUES COULD HAVE BEEN RAISED AND WAS IMPROPER ABSENT AN EXCEPTION TO *YOUNGER* PRINCIPLES

At the time of the filing of this proceeding in federal court, Appellees had an *opportunity* to present their federal claims in a suit pending in State court,

and no more is required to invoke *Younger* abstention, *Juidice v. Vail*, 430 U.S. 327, 336-337 (1977). The three-judge court herein dealt with abstention as a threshold issue and concluded that *Younger* principles did not apply. Two reasons were offered to justify this conclusion: ". . . the nature of the state action and the nature of the plaintiff's (sic) challenge." (*Sims*, A. 72.)

Characterizing the state action as "multifaceted," the court said that the dispute between Appellees and the State of Texas would involve more than a single state judicial proceeding in which Appellees could raise their constitutional defense. (*Sims*, A. 72.) The Supreme Court's interpretation of inability to defend in a single proceeding in state court was demonstrated in its application of that exception to the *Younger* rule against enjoining of state court proceedings in the case of *Dombrowski v. Pfister*, 380 U.S. 479 (1965). There, Plaintiffs were harassed by repeated arrests, seizures, and threats of prosecution because of their race. None of the prosecutions was intended to be carried to its judicial conclusion. Each was brought to intimidate, not to permit resolution in the state courts. Because many suits had been and would be brought and none would be pursued to judgment, the federal plaintiffs would be unable to defend themselves in a single suit in state court, not because their complaint was multifaceted and would require multiple defenses.

Multifaceted litigation can be effectively tried in state court proceedings. Indeed, state courts are often less pressed by time constraints caused by overcrowded dockets and, thus, can better deal with extensive discovery and lengthy development at trial than can three-judge federal courts which require the attendance of three busy jurists who are frequently unable to spend the time necessary to allow full development of the facts in multifaceted litigation. Multifaceted state action which allegedly violated Appellees' right to privacy under the United States Constitution and improp-

erly impinged on their right to family integrity could be raised as a defense or as a counterclaim in a single proceeding in State court.

Two suits were filed and pending in the State courts prior to the federal district court's taking any action of substance in this cause. The federal district court found that neither of the suits was brought for harassment. The first suit, which was filed in Harris County and in which an attempt was made to transfer to Montgomery County, was pending when the federal district court issued a temporary restraining order returning the children to Appellees. At that time, the federal district court expressly instructed Appellants that the temporary restraining order did not prevent their taking proper steps to seek custody of the children in appropriate judicial proceedings. (*Sims*, A. 68.) Appellants then filed a second suit in Montgomery County. Both suits sought the same relief; a final decision on the merits in either would have rendered the other *res judicata*. Under these circumstances, the pendency of two suits in State court did not mean that Appellees could not defend themselves in a single proceeding in State court.

In the section of its opinion in which it characterized the state action in *Sims* as multifaceted, the court pointed out that:

> Many of the chalienged actions taken by the state do not and will not involve any judicial proceeding. (*Sims*, A. 72.)

To illustrate non-judicial application of a statute, the federal district court described the child-abuse reporting system. (*Sims*, A. 92, n. 5.) The illustration is not illuminating. The normal everyday application of statutes without judicial involvement does not make state action mysteriously or uncommonly multifaceted. It is desirable for almost every statute to be applied without

judicial involvement. The lack of initial judicial involvement is not an extraordinary circumstance which should permit a federal court to find an exception to *Younger* under which it may enjoin state court proceedings.

The federal district court found procedures for emergency removal of a child from his parents' custody "patently and flagrantly violative of basic constitutional guarantees." (*Sims*, A. 75 and A. 90, n. 1.) Immediately thereafter, the court narrowed, interpreted, and rewrote the provisions it found constitutionally infirm. In so doing, it ineluctably demonstrated that each statute is not ". . . violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

Finally, the federal district court found substantial portions of the Texas Family Code unconstitutional on their face, and permanently enjoined Appellants from applying and enforcing them. (*Sims*, A. 88.) The preceding directives of that court made it unmistakably clear that Appellants were in fact enjoined only from applying the portions in any manner except that preferred by the court. However zealous the federal district court might have been, and even if it spoke in hyperbole, it clearly did not prohibit the use of all existing statutory procedure to remove children from immediate danger until an acceptable rewriting of the statute. (*See* discussion of *Dombrowski*, *supra*, in *Younger*, *supra*, at 51-54.) The federal district court's modifications of the challenged statutory provisions negated its characterization of any of the offensive provisions as "patently and flagrantly violative of basic constitutional guarantees."

As further basis for its assertion that an injunction was appropriate, the federal district court found highly unusual circumstances brought this case within excep-

tions set out by this Court in *Younger* and *Trainor v. Hernandez*, 431 U.S. 434 (1977), and found these circumstances compelled the court to grant equitable relief. The court said:

> . . . the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time . . . justify equitable relief even if *Younger* principles did apply. (*Sims*, A. 75.)

Though this Court has not set a rigid rule defining extraordinary circumstances which allows enjoining of state court proceedings, the exceptions devised under *Younger* clearly imply intentional violation of federally protected constitutional rights is required. Bad-faith prosecution, harassment, and statutes obviously written in wanton disregard of the Constitution as interpreted by this Court are examples of extraordinary situations which permit a federal court to enjoin proceedings in state courts. No such knowing or deliberate disregard of Appellees' constitutional rights was found credible by the court below or could have been found credible by any reasonable person.

This case is one in which honest mistakes were made in the application of the Texas Family Code. These mistakes were shared by judges, lawyers, and other State officials. They were not malicious or intentional errors, and the errors could have been corrected by State court remedies. Appellees could have obtained a hearing within a few days by simply insisting on their rights under Section 17.06 of the Texas Family Code. The attorneys for Appellees could easily have sought a writ of mandamus, if necessary, to require that such a hearing be held, but they did not. If they had, relief would undoubtedly have been afforded in the State court system as it was to Plaintiffs below in the consolidated *Woods* case. The state courts can adjudicate constitutional issues, as well as interpret the statutes

passed by their own state legislatures, in a manner consistent with prior state interpretations, if they are allowed to accept and carry out the duty which is theirs absent federal injunctive interference.

Assertions, or even proof, that mistakes, errors, and confusion abounded in a state court's management of the early stages of a proceeding pending before it cannot be said to rise to the level of the extraordinary circumstances that *Younger* admits as exceptions to its rule. The federal courts could neither act as a "primary and powerful" source of vindication of federally protected rights and allow deliberate disregard of federal law, nor act as proponents of comity and our federal system, if they intervened in state court proceedings because state proceedings were initially inept or incorrect or state agencies bungled.

Unfortunately, it cannot be honestly said that judicial confusion, delay, and error are maladies confined to state courts; issuing an injunction on the basis of these unextraordinary circumstances clearly contravenes *Younger* principles. Since harassment, bad-faith prosecution, the necessity of defending multiple suits in state court, flagrant or patent statutory violations of the Constitution, and other extraordinary circumstances were absent in the instant case, *Younger* principles applied in full force and the federal court should have abstained from enjoining State court proceedings.

I. B. ENJOINING STATE PROCEEDINGS DISRUPTED THE STATE'S PROTECTION OF THE SAME INTERESTS WHICH UNDERLIE ITS CRIMINAL LAW

Here as in *Huffman, supra*, the State brought proceedings in State court "to protect the very interests which underlie its criminal laws." The resulting threat to our federal system caused by federal court intervention in state court proceedings is as grave when the

state institutes civil proceedings to enforce its substantive policies as when the state prosecutes under its criminal laws. *Huffman, supra*, at 604.

While State proceedings in this case were civil, the child abuse statutes challenged in this action and enforced in the State courts are designed to protect children from dangerous adults, who, as in this case, often are their parents. This protective purpose of child abuse legislation is closely akin to that underlying criminal statutes. Criminal statutes are merely more inclusive in their protective function; they protect the whole of society from dangerous individuals. Both types of statutes regulate by defining proscribed behavior, by giving notice that the described behavior is prohibited, and by setting penalties for engaging in the prohibited behavior.

Substantive state policies and compelling state interests undergird child abuse statutes. Although parents are rarely criminally prosecuted for assaulting or battering their children unless their conduct results in the child's death, or constitutes sexual abuse so egregious that the community or other children unrelated to the offending adult are threatened, the analogy to criminal statutes remains applicable. *See* Texas Penal Code, Section 22.04 for criminal statute pertaining to injury to a child. But for the deference given to the parent-child relationship, adults who physically injure children would routinely be punished under appropriate criminal statutes.

Another similarity between criminal proceedings and these civil proceedings is the availability of habeas corpus. Enforcement of child abuse statutes often gives rise to parents' seeking writs of habeas corpus to gain possession of a child illegally detained by one not entitled to his custody. As in criminal cases, the availability of habeas proceedings gives the parent two methods of bringing constitutional claims before the court.

See Huffman, supra, at 605 and 606 for a discussion of habeas.

The federal district court's enjoining of proceedings in State court disrupted the State's enforcement of compelling interests similar to those underlying its criminal laws. Thus, this cause was brought within the Court's holding in *Huffman*. There, the Court made *Younger* comity principles applicable to federal judicial interference in civil proceedings which may be considered to be akin to criminal prosecutions.

I. C. ENJOINING STATE PROCEEDINGS DISRUPTED A SUIT BROUGHT BY THE STATE IN ITS SOVEREIGN CAPACITY AND REFLECTED NEGATIVELY ON ITS COURTS' ABILITY TO ADJUDICATE FEDERAL CLAIMS

The instant case falls squarely within this Court's holding in *Trainor v. Hernandez*, 431 U.S. 434 (1977). There the state had brought civil proceedings for welfare fraud and attached the recipients' property without notice. *Younger* and *Huffman* principles applied where the state in enforcing its laws took property without notice, absent a showing that state courts were inadequate to resolve the federal due process claims.

Unless it is shown that opportunity to contest the validity of the attachment would be unavailable in state proceedings, the Court observed in *Trainor, supra*, at 440-442 and 447, that it must not assume due process claims would not be addressed in state court proceedings. In *Sims* (A. 75), Appellees had statutory remedies for challenging the validity of the taking of their children by a motion to modify which could have been filed at any time prior to the expiration of the temporary emergency order. Section 17.06 of the Code. Habeas corpus relief was available also. These remedies

were available in addition to the opportunities which would have been available at the trial on the merits and in subsequent appeal.

The court below found "the absence of a fair opportunity to present constitutional claims at a meaningful time" to be one of the highly unusual circumstances justifying immediate federal equitable relief. When viewed in light of this Court's counsel that state appellate courts are the more appropriate forum for resolving constitutional contentions, *Huffman, supra*, at 609, the federal district court's assertion that no fair opportunity to present constitutional claims at a meaningful time existed is unwarranted. The fact that Appellees were frustrated in initial presentation under these provisions does not show that they could not have resolved their constitutional claims. Thus, here as in *Trainor, supra*, at 447, one cannot fairly conclude that State remedies were inadequate to vindicate federal constitutional claims.

This Court in *Trainor, supra*, at 446-447, further emphasized the importance of applying *Younger* principles in state enforcement proceedings when it required that the federal district court have some basis for finding a statute violative of express constitutional prohibitions in every clause, sentence, and paragraph. Refusal to permit the unsubstantiated labelling of a statute as flagrantly and patently violative of constitutional rights necessarily precludes that same characterization of some of the statutory provisions challenged herein. (*Sims*, A. 75.) Since any purported constitutional infirmities of the statutes cannot be shown to arise from wanton disregard of constitutional rights, no extraordinary circumstances existed in this case to allow an exception to the rule that federal courts ordinarily will not enjoin state court proceedings.

Analyzing a state's dilemma when its enforcement proceedings are disrupted by federal court proceedings, this Court said such action:

> . . . confronts the State with a choice of engaging in duplicative litigation . . . risking a . . . federal injunction, or of interrupting its enforcement proceedings. . . . *Trainor, supra*, at 445.

Of course, the State of Texas did not have to risk a federal injunction; it has had to live with one. As a result of the federal injunction, the State lost its opportunity to prove that Appellees had abused their children and was prevented from taking any further action to protect the children. Comity principles clearly required that the State, acting in its sovereign capacity to protect its minor citizens, be allowed to go forward with State proceedings in which Appellees could raise their constitutional claims and after which Appellees could appeal to this Court as a matter of right. Federal interference with State court proceedings reflected negatively on the State court's ability to carry out its responsibility to safeguard constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 460-461 (1974).

Because of the interference of the federal district court with the operation of the Juvenile Court of Montgomery County, Appellants have been completely frustrated in their efforts under the Texas Family Code to deal constructively with the family situation of the Sims and their children. The issues going to the welfare of the Sims' children have not been addressed. Under the guise of protecting family integrity Paul Sims was returned to parents whose cruel disciplinary procedures required his hospitalization for eleven days. The Sims discontinued counseling which might have helped to strengthen their family and to build a healthier home environment for the Sims and their children. Counseling aimed at helping Paul Sims cope with his

environment and resolve his personal problems was discontinued.

No hearing as provided for in Section 11.14 of the Texas Family Code has been held on the merits of this case. Separate and apart from the compelling interest of the State to intervene on Paul Sims' behalf and separate and apart from the interests of his parents, the guardian ad litem appointed by the juvenile court has been denied opportunity to represent his interests before any court. The interests of Paul Sims have been laid aside. "Family integrity" has been preserved by abrogating the personal rights of the Sims' children. Possible recurrence of excessive physical discipline and other forms of parental aggression is a danger which the State could have addressed had it been permitted to carry out its legitimate functions as lawmaker, social service provider, and judicial arbiter.

I. D. ENJOINING STATE PROCEEDINGS IN A SECOND SUIT FILED BEFORE ANY PROCEEDINGS OF SUBSTANCE ON THE MERITS HAD TAKEN PLACE IN FEDERAL COURT CONFLICTED WITH A PRIOR DECISION OF THIS COURT

A further holding of this Court in the *Younger* line of cases was made in a context similar to that of the instant case and forbade federal court interference with state criminal proceedings filed *after* the federal complaint but before any substantive proceedings on the merits in the federal court. *Hicks v. Miranda*, 422 U.S. 332 (1975). To hold otherwise, the Court reasoned, would trivialize *Younger* principles. *Hicks*, *supra*, at 350. In the case now presented, Appellants had filed a second suit in Montgomery County on May 14, 1976, after Judge Singleton advised Appellants at a hearing on May 5 that they could file a proper suit to protect the Sims children. (*Sims*, A. 68.) When Appellants

filed their second suit, they believed that by seeking to protect only Paul Sims and by obtaining a writ of attachment to place the boy with his adopted grandparents they were complying with Judge Singleton's earlier counsel. This second proceeding pending in State court before the three-judge court had taken any action on the merits — all earlier action was by Judge Singleton alone — was acknowledged in the federal district court's opinion but was not discussed. The federal district court seems to have regarded it as unimportant, but *Hicks*, *supra*, at 349, clearly makes this filing of such a suit call for the application of *Younger* principles in full force.

In *Hicks*, *supra*, the state proceedings were criminal but the Court's decision did not turn on the characterization of the state proceedings. Rather it firmly rested in the principles of comity which enable dual sovereigns to perform their overlapping functions with integrity. Vague and conclusory findings of bad faith and harassment would not be sufficient to call into play one of *Younger's* limited exceptions. *Hicks*, *supra*, at 350. Indeed, the Court admonished, a conclusion of bad faith or harassment would not necessarily follow had it been shown that the state courts erred on some issues of federal or state law. *Hicks*, *supra*, at 351. There was no finding of bad faith in the instant cause. Yet the federal district court's apparent perception that procedural irregularity, confusion, and attendant delay hindered Appellees' opportunity to present their constitutional claims was its justification for erroneously granting federal equitable relief even if *Younger* principles applied. (*Sims*, A. 75.)

I. E. ENJOINING STATE PROCEEDINGS INTERFERED WITH THE STATE'S RESOLUTION OF DIFFICULT QUESTIONS OF STATE LAW AND DISRUPTED ITS EFFORTS TO ESTABLISH COHERENT POLICY IN A MATTER OF SUBSTANTIAL PUBLIC CONCERN

There is no federal family law. Domestic relations have traditionally been solely within the purview of state courts. The State courts' management of venue and continuing jurisdiction (the essence of the problems with the first State court case filed herein) goes to the core of its administration of justice in child custody cases. Much as ". . . the contempt process . . . vindicates the regular operation of . . . [the State's] judicial system . . .," *Juidice v. Vail*, 430 U.S. 327 (1977), the State's insistence upon parents' presenting their children before the appropriate State forum for presentation of questions of custody is an essential element of its enforcement of statutes and of prior decisions in custody disputes. The availability of a federal forum to parents against whom child custody proceedings are pending in State court impedes the State's effort to shape and enforce coherent policy in this area of substantial public concern. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), for a discussion of the appropriateness of abstention when problems of public policy are paramount.

Whether child custody battles arise in the context of divorce or when transient troubled families move from place to place leaving suits affecting the parent-child relationship behind them, venue and continuing jurisdiction of subsequent suits present a complex problem. Venue for suits affecting the parent-child relationship lies where the child resides, Section 11.04 of the Code. Once such a suit is brought, continuing jurisdiction of all subsequent suits affecting the parent-child relationship lies with the court where the original suit was filed, Section 11.05 of the Code. Texas maintains a central file of all such suits and requires that a petition assert that the court in which the suit is filed has continuing jurisdiction or that no court has continuing jurisdiction of the suit being filed, Sections 11.08 and 11.17 of the Code. Complex and relatively new statutory provisions govern the transfer of suits affecting

the parent-child relationship. Texas' appellate courts are in the process of construing these statutes. *See*, e.g., *Cassidy v. Fuller*, 568 S.W.2d 845 (Tex. 1978), in which the Texas Supreme Court interpreted Section 11.06 of the Code.

Judge Lowry's transfer of the habeas corpus proceeding and the suit affecting the parent-child relationship from Harris County to Montgomery County (*Sims*, A. 66-67) was undoubtedly intended to establish venue where the children resided and where continuing jurisdiction of subsequent proceedings properly lay. The State court's management of venue and continuing jurisdiction in child custody suits lies at the core of its administration of justice in the area of family law dealing with the custody and possession of children. The federal district court should have abstained not only under *Younger* principles but also because substantial issues of State policy were involved. *See Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

II. WHETHER A CASE OR CONTROVERSY EXISTED

The threshold inquiry in a federal court is whether the plaintiff has standing to invoke the court's judicial powers to resolve the dispute and to ask the court to use its remedial powers to right asserted wrongs. Standing may be viewed as flowing from the requirement that federal courts decide only cases or controversies, U.S. Const., art. III, and from prudential considerations. Case or controversy requirements limit the judiciary to functioning in an adversary context in which opposing parties hone the issues into the sharpest possible focus for examination by the court called upon to resolve the dispute and place the judiciary in its proper role in our tripartite system. *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

Private litigation is almost always justiciable. In the area of constitutional challenges to statutes, the question of justiciability frequently arises and is at issue in the present case. The federal district court's power to decide the constitutionality of a statute is necessarily dependent upon its power to decide a case properly before it. *Marbury v. Madison*, 1 Cranch 137 (1803). In several respects the statutes challenged by Appellees were not properly before the federal district court. Further, Appellees showed neither a likelihood of immediate irreparable harm nor a lack of an adequate remedy at law in order to meet Article III case or controversy requisites with regard to the issuance of equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 502-508 (1974).

II. A. APPELLANTS HAD NO POWER TO APPOINT AN ATTORNEY AD ITEM, WERE NEVER ASKED TO DO SO, NEVER REFUSED TO DO SO, AND THE THREE-JUDGE COURT DENIED THEIR REQUEST THAT ONE BE APPOINTED

The federal district court had no jurisdiction concerning the State court's failure to appoint an attorney ad litem for the Sims children (*Sims*, A. 86-88), since Appellants were the wrong defendants against whom to raise this issue. No State legislative appropriation or statutory provision gives Appellants the power to appoint attorneys ad litem for children in suits affecting the parent-child relationship in which the State is a party. *See* Section 11.10 of the Code. Even if there were such authority, questions of conflict of interest could be raised with regard to Appellants' exercise of that authority. It is very unlikely that parents would fail to contest the appointment by the Appellants of attorneys ad litem for their children when the Appellants are seeking to remove custody from those parents. However, few litigants would freely confide in an attorney appointed by, or even in the most remote manner beholden to, their opponent in court. Further, Appellants were never asked to appoint an attorney ad litem, never refused to do so, and, in fact, Appellants' motion that the three-judge court do so was summarily denied. (Transcript of 8/4/76, p. 16.) *See Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

The State court judges, who were dismissed as defendants early on in these proceedings (Transcript of 8/4/76, p. 15), were the only persons who could have applied the allegedly unconstitutional provisions in a manner which would have met the constitutional requirements asserted by Appellees. Appointment of an attorney ad litem to protect the interests of a child made subject of a suit seeking termination of parental rights is within the discretion of the judge. *See* Section 11.10(a) and (c) of the Code. (*Sims*, A. 87.)

Of course, even this discussion ignores the fact that a termination suit was never brought by Appellants against Appellees. The lack of application of or injury by the challenged statute, which would have called Section 11.10 into play, clearly makes this issue one as to which there is no case or controversy.

II. B. APPELLEES WERE NOT INJURED BY THE CHILD ABUSE REPORTING SYSTEM

The three-judge court found the gathering and dissemination of information by the Child Abuse and Neglect Report and Inquiry System ("CANRIS") absent judicial involvement to be violative of due process and the right to privacy. (*Sims*, A. 82.)

The relief decreed is a far-reaching and unwarranted interference with the internal affairs of the State as it investigates child abuse since the Appellees were never injured by the CANRIS. *See Rizzo, supra*, at 371-381. No allegation that dissemination of infor-

mation occurred was ever made in this case, and in fact none ever occurred.

The CANRIS prevents any dissemination of information stored therein. Not only were Appellants improper defendants as to any alleged infringement of Appellees' privacy rights, but any alleged violation of due process or privacy rights also resulted in no injury to Appellees. The facts alleged support no "actual causal relationship" between the challenged statute or practices under it and Appellees' alleged injury. Appellees rely upon some remote possibility of injury and thus fail to establish their standing to challenge the CANRIS process. *See Warth v. Seldin*, 422 U.S. 490, 502-508 (1975).

II. C. PREPONDERANCE OF THE EVIDENCE AS A STANDARD OF PROOF WAS NEVER APPLIED TO APPELLEES

The statutory provision for preponderance of the evidence as the standard of proof in suits affecting the parent-child relationship was never applied to Appellees. Since no proceeding in State court moved forward to allow the standard to be used in this case, Appellees were not injured by it even in the pending custody suits. Additionally, no change in policy or increased diligence on Appellants' part could have effected the remedy decreed by the federal district court. The fact of injury caused by the challenged standard could not be demonstrated outside of judicial proceedings. Therefore, the federal district court's finding of a justiciable dispute between Appellants and Appellees rests on mere conjecture that injury might result if the standard were applied.

Any purported threat of immediate irreparable injury with regard to the standard of proof used in termination proceedings was remote indeed. *See O'Shea, supra*, at 502-504. The federal district court based its

finding of standing to challenge Chapter 15 of the Code on the spectre of the future filing of a suit seeking termination of parental rights. The spectre is not a frightening one for several reasons. The only evidence supporting the existence of this apparition was caseworker Rex Downing's statement in a deposition that ". . . he would seek termination as a part of the Montgomery County action . . ." (*Sims*, A. 78.) It is not clear what Mr. Downing meant. Did he mean "I would if I could"? or did he mean "I will"? (Deposition of Rex Downing, p. 27.) The federal district court did not allow live testimony to clarify this ambiguous statement on which it placed great reliance. (Transcript of 8/4/76, p. 17; Transcript of 10/26/76, p. 5.) Further, Mr. Downing had no authority to file a termination suit. He was required to confer with supervisory staff and to obtain a consensus as to the appropriateness of the filing of a petition seeking termination. In any case, Mr. Downing was obviously unable to carry out the purported threat because the suit in Montgomery County had already been filed when the federal district court enjoined all attempts to enforce the challenged State laws against Appellees (*Sims*, A. 67-68); and that suit sought only temporary conservatorship, not termination. (Defendant's Exhibit No. 15.) Finally, and most importantly, Mr. Downing was the lone alleged threatener of termination, and he was not joined as a defendant in these proceedings in federal court. *See Rizzo, supra*, at 371-373.

Parties joined in their official capacity and individually were not shown to have threatened Appellees with filing a termination suit anytime in the future; thus, Appellees had no proper defendant against whom they could raise the issue of threat of immediate irreparable injury under Chapter 15. *See Rizzo, id.* Causation must be shown in actions brought under the Civil Rights Act of 1871, 42 U.S.C. §1983. Liability under the respondeat superior theory will not be imposed on

government officials simply because the agency for which they work employs a tortfeasor. The accused official must be shown to have implemented or executed a policy or statute which violated the complainants' constitutional rights unless governmental custom is shown to have injured the complainants. *Monell v. Department of Social Services of the City of New York*, 98 S.Ct. 2018 (1978); *Rizzo, supra*, at 376-377. Therefore, the Sims never had standing to challenge the standard of proof set out by Chapter 11 of the Texas Family Code for a termination case.

II. D. APPELLANTS DID NOT CONTROL STATE COURT DOCKETS AND NEVER REFUSED APPELLEES A TIMELY HEARING

Appellants never refused Appellees a timely hearing. The State court's docket is controlled by the judge or his designee. Since the judges were dismissed from these proceedings at an early stage (Transcript of 8/4/76, p. 15), Appellees were left with no proper party against whom to assert their due process claims concerning injuries caused by departure from the statute's mandate that a hearing be held at the expiration of the ten-day order to determine whether the children should be returned to Appellees or whether a suit affecting the parent-child relationship should be filed.

Failure of Appellees to obtain the filing of or a hearing on their motion to modify was in no way caused by Appellants' conduct. (*Sims*, A. 66.) Appellants did not interfere with the filing of the motion. Appellees might have been able to state a claim against the clerk of the court or the judge, but neither of them was a party to this suit when it was decided on the merits. *See Rizzo, supra*, at 377. Equitable relief was granted against Appellants without adequate showing of responsibility or causal connection between Appellants' conduct and the injury alleged.

II. E. THE DISTRICT COURT'S ORDERS REMOVED ISSUES RELATING TO CUSTODY OF APPELLEES' CHILDREN FROM THE CASE

No live controversy existed between Appellants and Appellees with regard to the possession of the children at the time of the hearing on the merits in this federal proceeding and none exists for appellate review. *See Roe v. Wade*, 410 U.S. 113, 125 (1973) (citations omitted). Judge Singleton had ordered the children returned to Appellees (Order of 5/5/76), and Appellants had complied with that order. The children were in the custody of their parents and the issue of custody was not litigated in these or any other proceedings.

In the contest based on the writ of attachment issued in the second suit pending in Montgomery County, questions relating to the possession of Paul Sims were not ripe for judicial determination since Appellees had not been served with citation and attachment had not been levied. Any threat concerning the possible levying of attachment was not an injury for judicial determination. Even if attachment had been carried out and Paul Sims had been temporarily placed with his grandparents, it is not clear what effect his placement would have had upon Appellees' access to him, their enjoyment of his companionship, and the parent-child relationship between Appellees and the boy. The court never learned the proximity of grandparents' and Appellees' living quarters, the status of their relationship, or other relevant facts about the possible effect of levying attachment.

Because Appellees had present custody of their children, issues relating to the timeliness of hearings after removal, notice, and other aspects of removal procedure had become either moot or conjectural and thereby inappropriate for judicial resolution. Judge

Singleton's return of the children under an ex parte order prior to any adversary hearing in federal court had a mooting effect on the issues revolving around possession of the children. The three-judge court's enjoining of State proceedings removed the issue from the case on the merits and had the effect of permanently resolving the issue. *See Warth, supra*, at 516.

II. F. STATUTES RELIED UPON BY APPELLEES CANNOT ESTABLISH JURISDICTION OUTSIDE A CASE OR CONTROVERSY

The right to contract, which is one subject of the Civil Rights Act of 1871, 42 U.S.C. § 1981, was never raised as a real issue in this case, and therefore jurisdiction under it does not lie upon these facts. Appellees stated no cause of action under the general federal question statute, 28 U.S.C. § 1331. Moreover, jurisdiction is not conferred by the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; these sections merely create a remedy. *Terminal Freight Handling Co. v. Solien*, 444 F.2d 699 (8th Cir. 1971), *cert. denied* 405 U.S. 996 (1972). Section 1983 of the Civil Rights Act of 1871 and its companion jurisdictional statute, Section 1343 of Title 28, are the only possible basis of jurisdiction through which a cause of action could have been alleged. However, even under these statutes a federal plaintiff must have a defendant who actually violated the plaintiff's constitutional rights. Respondeat superior theories of vicarious responsibility are impermissible under these statutes which are intended to enforce the 14th Amendment. *Rizzo, supra*, 376-377; *Monell v. Department of Social Services of the City of New York, supra*. In any case, a proper defendant must be shown to have authority and capacity to perform the function desired as relief.

III. WHETHER THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL

A. THE STATE'S INTEREST IN PROTECTING CHILDREN AND CHILDREN'S RIGHTS TO BE FREE FROM INJURY BY THEIR PARENTS, TAKEN TOGETHER, OUTWEIGH ANY INFRINGEMENT ON PARENTS' CONSTITUTIONAL RIGHTS CAUSED BY THE CHILD ABUSE REPORTING SYSTEM

The federal district court found that the use of the Child Abuse and Neglect Reporting and Inquiry System (CANRIS, Section 34.06 of the Code) for collecting and storing in a computer information from case records gathered by the State in its legitimate investigation of reports of child abuse is violative of the right of privacy and due process guarantees absent a judicial determination of abuse or neglect. The court said that the State may obtain the information in question and maintain it in investigatory files, but it found that a computerized CANRIS exceeds permissible investigatory purposes. (*Sims*, A. 82.)

Both the federal district court and the State agree that the purpose of investigating reports of child abuse is to protect children who are in danger. That the State has a legitimate interest in protecting children from abuse and neglect is not contested. Maintaining files containing information discovered during investigation assists the State in determining whether protection is needed, and if so, what kind. Investigating reports of child abuse necessarily affects the privacy of the family to some degree. The right to family integrity and the right to preservation of the zone of privacy which surrounds the family are of great importance but they, like other constitutionally protected rights,

are not absolute. Rather, they are subject to reasonable regulation in furtherance of a legitimate state interest. *See Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 164-169 (1944). Pursuant to its legitimate interests the state can make and enforce reasonable laws which do not violate due process. *Newton v. Burgin*, 363 F.Supp. 782 [W.D. N.C. 1973 (*aff'd*, 414 U.S. 1139) 1974]; *Fuentes v. Shevin*, 407 U.S. 67, 90 (1972). The federal district court in effect found the State's statutes designed to effectuate its legitimate interest in protecting children were unreasonable; that is, they violated the right to privacy and due process guarantees, not by the investigation process nor by maintaining resulting data, but rather because of the means by which the data was stored.

Appellants asserted above as they do here that the right to privacy is not absolute. The nature of the right to privacy remains to be established. In *Paul v. Davis*, 424 U.S. 693, 713 (1976), this Court said that the right to privacy concerns the areas of marriage, procreation, contraception, family relationships, childrearing and education. The areas enumerated by the Court which are protected by the right to privacy are essentially personal areas in which a wide range of discretion and choice may permissibly be exercised; but they include education, an area which for most of us is largely controlled by the state. Though parents may choose between approved alternatives in educating their children, they are not free to exclude formal education entirely or to educate their children in any manner they devise.

The state places primary, but not exclusive, responsibility for childrearing on the discretion of parents. The rights of parents are shown great deference in the law. The family and the ethnic communities which support and nourish it are given room to function and flourish in our society because these institutions make

positive contributions to the socialization of young people who need to become autonomous citizens in a pluralistic society. Unique family qualities contribute to the richness of the fabric of the whole of society. But while parents are entitled to privacy, they do not have unmitigated discretion in childrearing. The state circumscribes parental choices in the areas of education, innoculation against disease, child labor, and in a plethora of other areas in which protective legislation fosters the nurturance of children. *See Prince, supra*, at 166. The state's interest in education is often superior to that of parents — for example, most of us are intimately acquainted with compulsory school attendance laws.

The federal district court quoted *Davis, supra*, at 713 in its opinion. (*Sims*, A. 82.) The *Davis* Court's inclusion of "education" in its list of concerns protected by the right to privacy makes it clear that even if education is an area in which the choice and discretion characteristic of privacy rights may be available when there are alternatives to public education, and even if it may be surrounded by zones of privacy, it is also an area in which governmental intrusion or participation is strikingly present. From this observation we may infer that the right to privacy not only can be infringed by laws made in accord with the state's legitimate interest but also that it regularly is. *Tarver v. Smith*, 78 Wash.2d 152, 470 P.2d 172 (1970), *cert. denied*, 402 U.S. 1000 (1971). It is unclear how due process fits in where education is concerned because few people are afforded any judicial determination before they are thrown into school; similarly without prior judicial determination, some may be labelled "truant," or a "C student," or something else like "class favorite."

Clearly, this Court was prudent in finding that injury to reputation does not require due process procedures. *Davis, supra*, at 701-710. When a change in

legal status, an adverse effect on property or liberty rights, or a reaching of the very rights implicit in our concept of ordered liberty is combined with injury to reputation, *Davis* at 705 discussing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951), procedural safeguards are necessary. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the posting of Constantineau's name as that of a problem drinker resulted in Constantineau's loss of freedom to purchase alcoholic beverages. Reputation alone, the Court held in *Davis*, is not a liberty or property interest protected by the Due Process Clause. *Davis* at 712.

Logically, whether reputation is besmirched as it relates to family responsibilities, marital obligations, honesty, or drug abuse, the significance of resulting injury can best be measured for purposes of providing an adequate remedy by assessing the amount of damage caused. Loss of employment, inability to attract new business, loss of freedom of choice in purchasing goods or in entering public places, and similar consequences would indicate injury which would likely be amenable to judicial resolution. In the present case there was no damage to reputation because no dissemination of information took place. Without dissemination, labelling is harmless. Injury to reputation requires a public response to the label applied. Being labelled a "perpetrator" injures no one if the appellation is not circulated.

Nevertheless, the federal district court found:

> The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*. . . . (*Sims*, A. 82.)

Why the injury to Appellees was "far greater" than the damage to Davis' reputation is not explained. Perhaps the court felt that there is a hierarchy of epithets

or perhaps the undisseminated accusation of injuring a child is worse than being publicly called a thief.

The CANRIS prohibits dissemination of information stored therein. Access to CANRIS information is unavailable even to workers investigating reports of child abuse. An investigating worker may only ask the CANRIS whether there have been previous reports of child abuse or neglect. Though the court said that dissemination by the CANRIS of information was impermissible, there was no allegation at any point in these proceedings that dissemination occurred, and in fact none did occur.

Any other analysis of when due process is required in cases involving reputation creates the problem of placing monetary value on the right to privacy in some extraordinary way or of finding the very act of storing investigative information in the CANRIS mysteriously injurious. Appellants are employees or officials of a statewide agency. CANRIS is in reality a statewide investigative file. If it is constitutionally permissible to maintain child abuse investigative files, it seems unreasonable to allow a parent to be subject to the gathering and collecting of information if he stays in one place but free of the collected information's effect if he moves about. A law which had that effect would encourage the very behaviors which are dangerous to children by prohibiting use of information about abusive conduct which the investigating worker did not learn on his own. If investigatory files may be maintained by the State, it is difficult to comprehend what is intrinsically more dangerous or offensive to privacy and due process rights about putting reports in a computer than in a file folder. In addition to the obvious utility of the CANRIS, no injury to Appellees resulted from the use of this large investigative file to which access is carefully limited. The reports of child abuse in the instant cause were based on information from

eyewitnesses, not data retrieved from a malevolent or even impersonal computer.

If the State should decide to seek a change in the legal status of a parent believed to be endangering his child, judicial proceedings would be instituted with attendant due process protections. Up to that time nothing would have happened under Section 34.06 to affect a parent's liberty or property interest or even his reputation interest. What would have happened to this point is merely that an investigation would have been made.

Section 34.06 does provide for sharing information; however, such sharing is for statistical purposes and is anonymous. Names of persons are not provided by the CANRIS.

In discussing the limitations on personal rights of privacy this Court observed:

> [I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. 113, 159 (1973). If the state has a compelling interest in protecting the health of an unborn child in the third trimester of his mother's pregnancy, so as to infringe upon the parent's personal right of privacy which earlier in her pregnancy permitted her to choose an abortion, it follows that the state's interest in protecting the health of a living battered child is at least equally compelling. The fact that all 50 states currently provide for mandatory reporting of incidents of child abuse and neglect convincingly demonstrates the compelling nature of the state's interest in protecting children. *See* Shepard, "The Abused

Child and the Law," The Rights of Children, 174, 182-83 (1973).

Where a child's well-being is an issue, the rights of the parent are not the chief consideration. The first and paramount duty is to consider the welfare of the child.

A parent's right of privacy as to the family relationship is not the primary right being protected by the CANRIS; rather, CANRIS is one limited attempt to facilitate protection of a child's personal right to be free from injury by adults. Since a parent has no right to injure his child, it would be unreasonable to permit him to harm his child and then claim a right of privacy in order to bar interference because the matter relates to the family relationship.

Quite the contrary, if the child is being physically injured by his parent, the state has both the right and the obligation to intercede to protect him. Indeed, to protect individual rights of a parent because of the family relationship, at the expense of the corresponding and sometimes competing individual rights of the child, is to give the parent greater individual and privacy rights because he is a family member, while commensurately diminishing the individual and privacy rights of the child because he is a member of the same family. To use the concept of family integrity to accomplish this end effectively swallows up the child in his parents' rights and obliterates his individual due process rights.

III. B. DUE PROCESS DOES NOT REQUIRE AN EMERGENCY EX PARTE HEARING ON THE VERY DAY OF TAKING EMERGENCY POSSESSION OF A CHILD

The federal district court exceeded the bounds of established due process standards when it required that every Texas court must hold its hearing on an emer-

gency petition seeking ratification of an extrajudicial taking of a child no later than the "very day" of the seizure. The leading case on this point is *Newton v. Burgin*, 363 F.Supp. 782 (W.D.N.C. 1973) (three-judge court), *aff. on appeal*, 414 U.S. 1139 (1974), without opinion. In *Newton* the plaintiffs claimed "that a parent has an immediate right to a hearing. . . ." and that a statute which allowed a five- to seven-day period to intervene between the state's assumption of custody of a child and the hearing was "unconstitutional in that it deprives the plaintiffs of custody without a hearing. . . ." *Newton*, at 786 and 785. The *Newton* court rejected the contention of the plaintiffs there and upheld the constitutionality of the challenged North Carolina statute. Appellees in the *Sims* case eventually abandoned an initially-asserted comparable contention. The *Sims* court upheld a ten-day period from seizure of a child by the State until a full adversary hearing was held. Neither Appellants nor Appellees challenge this holding. The emergency action authorized by Section 17.01 of the Texas Family Code is explicitly approved in *Sims* at A. 83. However, disagreement exists over the procedure to be followed in filing a petition and obtaining an ex parte order following an emergency removal of a child.

What remains at issue in this aspect of the appeal of the *Sims* decision is the timing of the ex parte presentation to a court of the request for judicial sanction of an extrajudicial taking of a child. It should be noted that in this cause the child was abused and removed by the Department on March 25, and the ex parte hearing was held the "very *next* day" or March 26. The *Newton* court did not require any more than such ex parte approval. The *Sims* court has required "the State to make all reasonable efforts to serve upon them [the parents] notice of this initial presentation to the court." (*Sims*, A. 83.) Appellants do not contest this

additional requirement. They only argue that it is impermissible to require that this emergency ex parte hearing (i.e., the initial presentation to a judicial authority) be held *not* "beyond the very day of seizure." (*Sims*, A. 83.) Such a conclusion not only is not required by the dictates of the concept of flexible due process principles for "extraordinary situations" stemming from the cases analyzed in *Newton* at 786-787, but also is inconsistent with the tenor of the guidelines set out in those and other "extraordinary situation" cases. *See Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); as well as, *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971); and *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961). Indeed, the *Newton* court implicitly approved the North Carolina State court's clear refusal to afford the plaintiffs therein a hearing either at eighteen hours or at three days after the state had assumed custody of their child. At 787 and 784.

The relief Appellees plead for here is so limited as to belie its importance. They ask that the representatives of the governmental agency charged with protecting the children of Texas be allowed a reasonable time (i.e., not the "very day") to seek judicial approval for the assumption of emergency custody of children whose health or safety is endangered. If such relief is not granted, the Texas Department of Human Resources will be compelled by the *Sims* decision to return such children to conditions threatening their health and physical safety for no reason other than the inability to secure judicial sanction of an emergency seizure on the "very day" it occurs. It should also be noted that the real problem herein had to do with timing of the *adversary* hearing, but the federal district court allowed the statutory ten-day standard for that hearing to stand.

III. C. DUE PROCESS DOES NOT REQUIRE APPOINTMENT OF AN ATTORNEY AD LITEM FOR A CHILD AT THE EMERGENCY EX PARTE HEARING

The three-judge court held that an attorney ad litem must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. Appellants contest this ruling only insofar as the court included in its decision a requirement for representation at the ex parte hearing required in a Chapter 17 emergency proceeding. An examination of applicable constitutional standards will demonstrate that appointment of an attorney ad litem for this "very day" hearing is not necessary to fulfill due process requirements.

It is clear that due process standards are not static; they must be determined with regard to the time, place, and circumstances involved in the fact situation under consideration. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Cafeteria Workers, supra*, at 895. Appellants do not contest the federal district court's conclusion that an attorney ad litem should be appointed to represent the child in every suit affecting parent-child relationships which could be determinative of the child's status. The "very day" hearing, however, can never settle any right of any party; it is held merely to determine whether an emergency situation exists. If the State court decides that the child is in need of emergency protection, a full adversary hearing, including an attorney ad litem appointed to represent the child, will be held within ten days of the Department's taking custody of the child. It is only at this second hearing that the legal relationship between a parent and child can be altered. Appointment of an attorney ad litem for the initial hearing to determine whether there is an emergency is not necessary to meet the fundamental fairness standard for due process in juvenile proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for analysis of how due process requirements should be determined in cases involving the constitutional rights of minors. This fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than ten days from actual seizure of the child.

An additional consideration is the undue burden such a requirement creates. If an attorney ad litem for the child were necessary for the initial hearing the practical implications would be overwhelming, especially in the large rural areas of the State and particularly when weighed against the short-term impact of the ex parte emergency hearing.

Finally, the ruling of the district court fails to take into consideration the existing procedures used by Texas district courts handling Title 2 matters. Some urban counties, for example, have permanent full-time guardians ad litem available to represent the interests of children, pursuant to Section 11.10 of the Texas Family Code. The decision by the three-judge court fails to make it clear whether the presence of a guardian ad litem is sufficient to fulfill due process standards, or whether both a guardian and an attorney ad litem must be present.

III. D. PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF IN SUITS SEEKING TERMINATION OF PARENTAL RIGHTS SATISFIES DUE PROCESS REQUIREMENTS

The district court held that "[w]hile such a suit [affecting the parent-child relationship] is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt . . . the fundamental right to family integrity requires at the very least that the State . . .

prove its case by clear and convincing evidence." (*Sims*, A. 85.) This requirement that suits instituted for the protection of children be determined by a standard higher than preponderance of the evidence reaches far beyond the scope of due process requirements.

First, the three-judge court cited the district court opinion in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975), for the proposition that the right to family integrity deserves a standard of clear and convincing evidence. In its appellate review of *Alsager*, the Eighth Circuit expressly declined to rule on the appropriate standard of proof at a parental termination hearing in order to leave open future consideration of the issue:

> Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future.

Alsager v. District Court of Polk County, 545 F.2d 1137, 1138 (8th Cir. 1976). Thus, neither the Eighth Circuit nor this Court has ruled on the appropriate standard of proof in a suit affecting the parent-child relationship. The proposition that the appropriate standard is "preponderance of the evidence" rather than "clear and convincing evidence" is elaborated on in the discussion below.

Second, the three-judge court's sweeping and facile assertion that because the right is a fundamental right it mandates a clear and convincing standard of evidence is not supported by careful or persuasive analysis and is premature, especially in the area of child abuse and neglect which is developing rapidly and involves innumerable factors not ready quantifiable. Because of the difficulty in obtaining the facts constituting child abuse or neglect, the traditional standard of proof, which is preponderance of the evidence and with which juries are familiar, should apply.

Third, as discussed in the examination of the CANRIS system, a parent's right to rear his child as he sees fit is not the only important right to be weighed; the child's right to protection from abuse and neglect is of at least equal importance. Social workers who investigate child abuse cases are not trained in the gathering of evidence as are law enforcement officers. A standard of clear and convincing evidence seriously jeopardizes the child's right to protection; since by social custom as well as by statutory and constitutional law, family life is already shielded from public view and precipitous intervention.

Finally, an application of the clear and convincing evidence standard in suits affecting the parent-child relationship where conservatorship or termination is sought would be an unwarranted intrusion into state evidentiary law. In Texas, where litigating parties have a right to have fact issues in equity as well as at law tried before a jury, "clear and convincing evidence" is a judicial standard of factual sufficiency and may not be submitted to the jury. *State v. Turner*, 556 S.W.2d 563, 565-566 (Tex. 1977), *cert. denied*, 98 S.Ct. 1499 (1978); *Boenker v. Boenker*, 405 S.W.2d 843, 847 (Tex. Civ. App. — Houston, 1966, writ dism'd); *Andrews v. Dewberry*, 242 S.W.2d 685, 687 (Tex. Civ. App. — Ft. Worth 1951, writ ref'd n.r.e.); *Sanders v. Harder*, 227 S.W.2d 206, 209 (Tex. 1950); *See also Meadows v. Green*, 524 S.W.2d 509, 510 (Tex. 1975); *Omohundro v. Matthews*, 341 S.W.2d 401, 410-411 (Tex. 1960); *McCormick's Handbook of the Law of Evidence*, 2nd Edition (1972) p. 797, fn. 73. Thus, requirement of this higher standard would not only alter the Texas evidentiary system radically, it would also constitute a violation of the comity principles enunciated in *Younger* and its civil progeny.

Moreover, by its very consideration of the standard of proof issue, the federal district court acted beyond the scope of its powers as set out by Article III of the United States Constitution. By the terms of this Article, the judicial authority of federal courts is limited to cases or controversies. U.S. CONST. ART. III, § 2, *O'Shea*, *supra*, at 493. In order to establish a case or controversy a plaintiff must allege direct injury or threat of direct injury to himself. *O'Shea* at 494. If the issue argued by the plaintiff is merely hypothetical, its consideration is outside the scope of the power of the federal judiciary since any ruling would constitute a mere advisory opinion. *Hall v. Beals*, 396 U.S. 45, 48 (1969).

The federal district court reached the issue of standard of proof in suits affecting the parent-child relationship by stating that even though no such suit had been brought with regard to the Sims children, ". . . the spectre of a Chapter 15 [termination] suit involving the Sims family is sufficient to confer standing." (*Sims*, A. 78.) The federal district court incorrectly stated in its opinion that a Chapter 15 termination action had been filed on May 14, 1976; no such action was *ever* filed in this suit. The federal district court brought the issue of standard of proof into question by reasoning that since a Chapter 15 termination suit *could* eventually be brought by the Texas Department of Human Resources with regard to Paul Sims, this possibility conferred on the three-judge court the jurisdiction to consider the constitutionality of the standard of proof which would be used in such a suit. Actually, the court below should have viewed this possibility as a reason to allow the State court to proceed to the merits rather than as a rationale justifying its decision to return Paul Sims under the guise of preserving family integrity. The attempt to bring the standard of proof issue within the Article III grant of judicial authority falls short of constitutional standards for several reasons.

First, the federal district court justified its consideration of the standard of proof question by stating that "This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent." (*Sims*, A. 77.) Since Appellants repeatedly objected to the federal district court's consideration of Family Code provisions not actually involved in the factual dispute, it is clear that Appellants never agreed that the challenged provisions were interdependent. (Transcript of Proceedings, October 26, 1976, pp. 36, 153-55, and 182.) Thus, the three-judge court's examination of the standard of proof in suits affecting the parent-child relationship was not done by agreement of the parties.

Second, the criteria for a case or controversy set out in the two cases the federal district court employs to justify its consideration of the standard of proof, *O'Shea*, *supra*, and *Massachusetts v. Mellon*, 262 U.S. 447 (1923), are not met by the facts in this case. The language of *O'Shea* and *Mellon* expressly state "[a]bstract injury is not enough," *O'Shea* at 494; and the plaintiff must allege that he "has sustained or is immediately in danger of sustaining some direct injury," *Mellon* at 488. The Sims did not face the requisite direct injury by the challenged standard of proof provision. In the first place, no termination suit in which the "preponderance of the evidence" standard would have been used had even been brought against the Sims. They had never been subjected to the challenged statute and therefore suffered no injury by it. In the second place, the only possible threat of imposition of the challenged standard came from the caseworker Rex Downing's statement that he would probably recommend that termination of the parent-child relationship be sought. This alleged "threat" fails to meet the "immediate danger of direct injury" criterion set out in *Mellon*, since a single caseworker does not have the authority to make the decision to institute a termination proceeding. Under Texas Department of Human

Resources regulations, when a child is to be removed from his home, the decision of whether court action will include a request for termination must be concurred in by the supervisor and the caseworker. Thus, Mr. Downing's statement that he would recommend that termination be sought falls far short of proving that the Sims suffered the requisite threat of injury; certainly they suffered no actual injury.

Finally, even if the Sims had faced direct injury from a termination proceeding, the allegations regarding the standard of proof fail to meet the "case or controversy" standard since the child in question was returned to his parents before the trial on the merits. In order to constitute a case or controversy, the actual controversy must exist at the time of appellate review and not simply at the date the action is initiated. *Roe v. Wade*, 410 U.S. 113, 123-129 (1973). Thus, since there is presently no reasonable expectation that Paul Sims will be the subject of a suit affecting the parent-child relationship which would use the challenged standard of proof, the issue fails to meet the case or controversy standard for lack of ripeness, and the three-judge court ruled on this issue outside the scope of its constitutional power.

CONCLUSION

The three-judge court should have abstained. There was no jurisdiction as to many of the constitutional issues raised. The case was incorrectly decided on the merits. Appellants pray that the Amended Judgment of the court below be reversed and the case be remanded with instructions to dismiss the Complaint or, in the alternative, reversed and judgment rendered for Appellants on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing Appellants' Brief on the Merits have on this the _____ day of December, 1978 been sent by United States Postal Service, Certified, Return Receipt Requested, to the following:

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-6

HILMAR G. MOORE, RAUL JIMENEZ AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY OF THE TEXAS BOARD OF HUMAN RESOURCES, ET AL.,
Appellants

v.

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS, AND SHAWANA EVETTE SIMS,
Appellees

On Appeal from the United States District Court For The Southern District Of Texas Houston Division

APPELLEES' BRIEF

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Appellees

On Appeal from the United States District Court
For The Southern District Of Texas
Houston Division

APPELLEES' BRIEF

To The Honorable Justices of the Supreme Court of the United States:

Appellee John Pleasant Sims, et al, respectfully submit this their Brief on the merits.

OPINION BELOW

The opinion of the Three-Judge District Court for the Southern District of Texas, Houston Division is reproduced in Volume I of the Appendix, page 61 and is reported at 438 F. Supp. 1179 (S.D. Tex. 1977).

JURISDICTION

Jurisdiction was invoked pursuant to the provisions of 42 U.S.C. § 1983; 28 U.S.C. §§ 1331, 2201, 2281, 2284; and the following provisions of the United States Constitution: Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth, and Fourteenth Amendments.

STATUTES INVOLVED

The statutes applicable, with the exception of those stated below are set out in Appendix I, Volume II, P. A-131 and Appendix J., Volume II, A-182 of Appellants' Jurisdictional Statement.

ADDITIONAL STATUTES INVOLVED

Chapter 11, sections 11.06 and 11.09; Chapter 17, section 17.01 and Chapter 34, section 34.08 of the Texas Family Code (1975).

QUESTIONS PRESENTED

I.

WHETHER OR NOT ABSTENTION IS PROPER IN THIS CASE.

II.

WHETHER OR NOT THIS ACTION PRESENTS A CASE OR CONTROVERSY.

III.

WHETHER OR NOT SECTIONS 11.10 AND 11.15 OF CHAPTER 11 AND SECTIONS 17.02, 17.03, 17.05 AND 17.06 OF CHAPTER 17 AND SECTIONS 34.05 (c) AND 34.08 OF CHAPTER 34 OF TITLE TWO OF THE TEXAS FAMILY CODE ARE UNCONSTITUTIONAL ON THEIR FACE.

IV.

WHETHER OR NOT SECTIONS 11.11(a) (4) OF CHAPTER 11 USED IN CONJUNCTION WITH CHAPTER 17 OF TITLE TWO OF THE TEXAS FAMILY CODE ARE UNCONSTITUTIONAL AS APPLIED.

STATEMENT OF THE CASE

John Pleasant and Mary Carter Sims are adult Appellees in this case. Minor Appellee Sabrina Marie Sims is the natural child of the adult Appellees. Minor Appellees Paul Edward Sims and Shawana Evette Sims were adopted through Harris County Child Welfare by the adult Appellees. In March, 1976, the Sims children resided with their parents in Montgomery County, Texas, and attended school in Houston, Harris County, Texas.

On March 25, 1976, in response to a telephone referral alleging child abuse made by school personnel regarding only Paul, Child Welfare agent and employee, caseworker Rex Downing went to the school. Shortly after 1:30 P.M., he took possession and control without a court order, of not just Paul but the two other Sims children as well, and then transported all three to the

Child Welfare Clinic where they were examined by Dr. Marie L. Surgi over the express objections of adult Appellees. The minor Appellees were never delivered to any court.

On March 26, 1976, at 4:54 P.M. Betsy C. Connor (a Welfare court representative who is not an attorney) filed a Suit For Protection Of Child In Emergency pursuant to provisions of Chapter 17, Title 2, Texas Family Code which was docketed under Cause No. 38,295 in the Juvenile Court Number One (1) of Harris County, Texas, and in which all three minor Appellees were made subjects of the suit. No names or places of residence of the parents or persons responsible for the care of the three minors appeared at any place in the petition although the Petitioner therein requested "that citation and notice be issued to all persons named." On the same day, Judge Robert L. Lowry of the Harris County Juvenile Court Number One (1) entered an Ex Parte Order by the terms of which Child Welfare was made temporary managing conservator of the three minor Appellees.

On March 31, 1976, counsel for the adult Appellees filed a Motion To Modify Temporary Orders For Emergency Protection Of Child with attached proposed Order Modifying Temporary Orders. Both instruments were stamped "Received" and "JUV" by the Clerk of the Juvenile Court but were returned to counsel by the Clerk who had been instructed not to set a hearing. On the same day counsel for adult Appellees also filed a Petition for Writ of Habeas Corpus seeking return of the three minor Appellees, which suit was docketed as Cause No. 1,069,341 in Juvenile Court and upon which a hearing was set for April 5, 1976, at 10:30 A.M.

Adult Appellees caused notice of the filing of their Petition for Writ of Habeas Corpus and of the hearing set thereon to be served upon Harris County Child Welfare and also issued subpoenas for attendance of witnesses.

On April 5, 1976, at the hearing on the Petition for Writ of Habeas Corpus, Judge Lowry determined that all of the Appellees were residents of Montgomery County, Texas. Upon such determination and without receiving evidence, the Court ruled it did not have power to hear the habeas corpus proceeding although Judge Lowry had personal knowledge that the three minor Appellees were restrained in Harris County, Texas by virtue of the terms of his own Ex Parte Order entered March 26, 1976. The case was then transferred to Montgomery County, however, the minor Appellees remained in Harris County and in the possession of Harris County Child Welfare. The second cause filed by Harris County Child Welfare was also transferred to Montgomery County. On the same day, at 4:47 P.M., Ms. Connor filed a second suit in Cause No. 38,295 on the docket of the Harris County Juvenile Court Number One (1), entitled Original Petition In Suit Affecting Parent-Child Relationship.

Subsequent to the filing of the Original Petition, Judge Lowry entered a second Ex Parte Order continuing temporary managing conservatorship of the three minor Appellees in Harris County Child Welfare. This second Ex Parte Order, setting both temporary and final hearings in the second suit, shows them both to be set for "the ____ day of _____, 19____ at _____ o'clock ___.M." and appoints "An attorney _____ . . .

to serve as guardian ad litem and represent the minor child(ren) at all hearings. . . ."

On May 4, 1976, still seeking return of their children, adult Appellees filed an Application For Leave To File Writ Of Habeas Corpus in the Court of Civil Appeals, 14th Supreme Judicial District of Texas, sitting at Houston. Such Application was denied by the Court for lack of jurisdiction on May 4, 1976. On May 5, 1976, at a hearing before the Federal District Court, there was testimony adduced that the blanks appearing in the Order had never been filled in. The transferred cases were received and docketed (Cause No. 3,030) in Montgomery County on April 6, 1976. No hearing of any kind was ever held by the Montgomery County Court. The three children remained in the possession and control of Harris County.

The first hearing afforded Appellees after seizure of the three minors on March 25, 1976, was that of May 5, 1976, before the Honorable John V. Singleton, Jr. who ordered the return of three minor Appellees to the adult Appellees on May 14, 1976. Nine days after the Federal District Court ordered return of the minor Appellees, a third suit was filed by the Appellants as an Original Petition In Suit Affecting The Parent-Child Relationship (docketed as Cause No. 3,090) in the Juvenile Court of Montgomery County, Texas. The suit filed in Montgomery County on May 14, 1976, pertained only to the minor Appellee Paul Edward Sims. On the same day, Ernest L. Coker, Sr., Judge of the Juvenile Court of Montgomery County, Texas, issued an Ex Parte Writ of Attachment for Paul Edward Sims. A hearing was set for May 21, 1976.

On May 21, 1976, counsel for Appellees made application to the Federal District Court for a Temporary Restraining Order, which was granted by Judge Singleton. The Three Judge Court issued a Preliminary Injunction, restraining and enjoining Appellants from filing or prosecuting any action in State Court based upon the State statutes that were unconstitutional. The Three Judge Court found "irreparable harm and injury to Appellees: 1) by the very fact that in the initial proceeding initiated by the State the Appellees' family unit was disrupted for a total of forty-two (42) days without any type of relief afforded to Appellees; and 2) if the Appellants were allowed to initiate further proceedings Appellees would be placed in a similar situation as they had been prior to obtaining Federal Court relief."[1]

The names of the Appellees now appear as "perpetrators" and/or victims of child abuse in a central registry maintained by the Texas State Department of Public Welfare in Austin, Texas, by two separate incidents: March 25, 1976 (date of initial seizure of the three minor Appellees) and May 5, 1976 (the date on which minor Appellees were ordered restored to adult Appellees by this Court), although no judicial finding of any such abuse has been made. Information gathered by Harris County Child Welfare in the course of adoption of the minor Appellees Paul Edward Sims and Shawana Evette Sims by the adult Appellees in 1974 and 1975 was not retired and sealed following such adoptions. In fact and instead, such information was referred to and used by such Agency and also transmitted to the Montgomery County Agency of the Department during the time of

1. Order of Preliminary Injunction entered June 18, 1976.

their seizure, possession and control of the minor Appellees.

Dorothy Mae Woods, et al. (76-H-1120) was consolidated by Court Order with the Sims case on July 16, 1976. The Plaintiffs in the Woods case were Dorothy Mae Woods and her minor child Rebecca E. Woods.

The following is a chronology of the Woods case.

(1) The Woods originally filed this cause seeking to restrain the enforcement, operation and execution of Title 2, Chapters 11, 15 and 17 of the Texas Family Code and other discriminatory and arbitrary practices on the part of the State which violated rights guaranteed by the Fourteenth (14th) Amendment of the United States Constitution.

(2) Dorothy Mae and Rebecca E. Woods had been receiving supportive service through the State Department of Human Resources prior to January 21, 1976.

(3) On January 21, 1976, Judy Albracht, an employee (Social Worker) of the State Department picked Rebecca E. Woods up from Nursery School without notice to Dorothy Mae Woods. The Social Worker left only a hand written note on the door of Rebecca Woods' residence. The note was dated January 21, 1976, 4:00 o'clock P.M., and stated:

> "Mrs. Woods: Harris County Child Welfare has picked up your daughter, Becky, and she is now in a foster home. I need to talk to you about this—call me as soon as possible."

It was signed by Judy Albracht.

(4) On the same day, employees of the State Department of Human Resources obtained a Temporary Order from Criss Cole, Judge of Juvenile Court Number Three (3) in and for Harris County, Texas. The order appointed the director of Harris County Child Welfare as temporary managing conservator of Rebecca E. Woods. The order was obtained without presenting the child to a Judge and without the existence of an emergency as required by Title 2, Section 17.01 of the Texas Family Code. Judge Cole set February 2, 1976, as the date for a show cause hearing to determine temporary custody pending final hearing on termination of parental rights.

(5) Dorothy Mae Woods received a telephone call from one of the Department's employees and was told the date and time of the show cause hearing. She was not served with process.

(6) The show cause hearing was held on February 2, 1976, and the Petitioner was given temporary custody and appointed temporary managing conservator of the minor child. Dorothy Mae Woods was present, however. she was not represented by counsel.

(7) The final hearing was set for April 8, 1976, however, the case was not heard until April 29, 1976.

(8) Dorothy Mae Woods' parental rights were terminated by Judge Cole on April 30, 1976; Harris County Child Welfare was appointed managing conservator and that attorney ad litem was awarded two hundred ($200.-00) dollars. Mrs. Woods was present and represented at the final hearing by Nicholas Serna, Esq., Gulf Coast Legal Foundation. The following events occurred:

May 20, 1976—A motion for a new trial was heard and denied.

May 26, 1976—Hearing, Order on Pauper's Oath signed.

May 28, 1976—Motion to Suspend the Trial Court's judgment pending appeal was denied; Ray Hardy's District Clerk's contest to Pauper's Oath overruled and Pauper's Oath sustained. An Order was signed on that date.

June 24, 1976—Finding of facts was signed.

July 2, 1976—Mrs. Woods complaint was filed with the Court (Federal District Court).

July 2, 1976—Motion to Maintain Class action and affidavit in support thereof was filed.

July 15, 1976—A transcript of the Juvenile Court's proceedings was filed with the Court of Civil Appeals First Supreme Judicial District of Texas at Houston, Texas.

July 16, 1976—Court's Order granted Mrs. Woods' attorney's leave to file Motion to Consolidate—Cause was consolidated with SIMS # 76-H-665 District Court of Texas at Houston, Texas.

July 21, 1976—The Statement of Facts was filed with the Court of Civil Appeals.

August 18, 1976—Mrs. Woods' et al's brief was filed with the Court of Civil Appeals.

October 14, 1976—Woods' Motion to Stay Proceedings in Federal Court was filed.

November 8, 1976—The above motion was granted by the Court.

(9) On December 8, 1976, the Texas Court of Civil Appeals reversed and remanded the Juvenile Court's

Order which terminated the parent-child relations (*In Re: R.E.W.*, 545 S.W.2d 573 (C.A. 1976) in an opinion filed by Associate Justice Evans. The issue of the right of indigent persons to have Court appointed counsel in proceedings affecting the parent-child relationship was not dealt with by the above Court.

January 13, 1977—A Motion for Rehearing was filed by Appellee State Department et al. That motion was denied.

February 23, 1977—Woods' Petition for Writ of Error was filed with the Court of Civil Appeals.

May 11, 1977—The Texas Supreme Court refused Writs of Error, N.R.E.

May 25, 1977—The parties reached a settlement by way of a Return Home Agreement between Harris County Child Welfare and Dorothy Mae Woods. The agreement expired on November 30, 1977.

July 26, 1977—The Court of Civil Appeals issued its mandate. The mandate was forwarded to Ray Hardy, District Clerk, Harris County, Texas.

July 29, 1977—Rebecca E. Woods was returned to Dorothy Mae Woods.

(10) On August 17, 1977, an agreed Motion to Dismiss the cause and to receive all prior orders of the Juvenile Court terminating the parental rights of Mrs. Woods, et al. was granted by the Juvenile Court.

February 27, 1978, Judgment was rendered on SIMS; the order in that cause expressly states "That this Court's consolidation of the issue of the right of indigent parents to have counsel was ill advised, but that issue shall re-

main pending in Civil Action Number 76-H-1120, before another Judge of this Court" (this case).

(11) The right of indigent persons to have court appointed counsel in proceedings affecting the parent-child relationship is being litigated at this point.

It should be noted that Harris County Child Welfare has caused another petition to terminate the parental rights of Dorothy Mae Woods to be filed.

SUMMARY OF ARGUMENT

I

The case before the court presents a situation involving a family composed of two parents and three children whose fundamental rights were denied and violated by an unwarranted and unjustified intrusion by the State. The parent-child relationship is very delicate. Consequently, any intrusion into the relationship is at the very least disruptive and can be traumatic. The Sims family unit was disrupted by the State for a period of forty-two (42) days without notice and a hearing. Abstention would not be proper in this case. This action does present a case and controversy, further that the statutes involved are either unconstitutional on their face or as applied.

The case at hand is an exception to the abstention doctrine. This case could not have been disposed of on questions of state law. There was no conflict with the administration by a state with its own affairs. This was not an instance where there were unsettled questions of state law for the Court to resolve. Appellees had no

adequate remedy at law and would have suffered great and irreparable harm if equitable jurisdiction had been denied. The statutes challenged were found to be both "flagrantly and patently violative of federal constitutional requirements."

Equitable relief was proper and this cause does present a case and controversy. Equitable relief was further proper in that there was both an adequate showing of responsibility and causal connection between Appellants' contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Federal District Court in its decision of October, 1977. Appellants' conduct in this case is truly capable of repetition yet paradoxically may evade review. To say that this cause should not be litigated simply because the Federal Court returned the children during the pendency of this cause would be a way in which the state could evade review of constitutional infringements within this area of family law.

In addition, Section 11.10 and 11.15 of Chapter 11 and Sections 17.02, 17.03, 17.05 and 17.06 of Chapter 17 and Sections 34.05(c) and 34.08 of Chapter 34 of Title Two of the Texas Family Code are unconstitutional on their face. Section 11.11(a)(4) of Chapter 11 used in conjunction with Chapter 17 of Title Two of the Texas Family Code are unconstitutional as applied.

The issues in this case not only involve possession of the children, but the denial of due process, unconstitutionality of the State statutes, deprivation of constitutional rights under the color of law, the integrity of the family unit, the interest of the parties and the right to privacy.

ARGUMENT

I

ABSTENTION WOULD NOT BE PROPER IN THIS CASE

The circumstances in this cause are such that abstention would not be proper. The *facts* of this case dictate federal intervention as it constitutes an exception to the principles of the abstention doctrines. Abstention originated upon the theory that the State and Federal Courts have separate functions. "The concept of federalism or comity represents a system in which there is sensitivity to the legitimate interest of both state and national governments . . . ," *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Younger v. Harris,* 401 U.S. 37 (1971). Where abstention is involved, a Federal Court will usually defer to a State to allow the State Court the opportunity to rule on state law policy, however, this Court has recognized circumstances where the usual abstention doctrines do not apply.

In *Younger v. Harris,* (supra), hereinafter referred to as *Younger* or *Younger Doctrine,* this Court held that abstention is appropriate where, absent bad faith, harrassment or a patently invalid state statute, federal jurisdiction is invoked for the purpose of restraining state criminal proceedings. The *Younger Doctrine* was first extended to a civil case in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), a case involving a pending state civil nuisance proceeding antecedent to a criminal prosecution.

To meet the *Younger* test the federal plaintiff must show the following:

A. MANIFEST BAD FAITH

In the case at hand, the state first instituted a suit affecting the parent-child relationship in Houston, Harris County, Texas. The children were taken into custody on March 25, 1976. An Ex Parte Order was issued by Robert L. Lowry, sitting as Judge of Juvenile Court Number One (1), in and for Harris County, Texas. The Ex Parte Order, which was issued pursuant to Chapter 17, Sections 17.04 and 17.05, of the Texas Family Code (1975) gave temporary custody to Harris County Child Welfare.

The following circumstances constitute manifest bad faith: The parents were not notified as to the whereabouts of their children. They were not accorded a hearing even though the temporary order expired ten (10) days after the filing of the original petition, according to Chapter 17, Section 17.05(a), of the Texas Family Code (1975), which states that "an order issued under Section 17.04 of this code expires at the end of the ten (10) day period following the date of the order . . .".

On March 31, 1976, the parents sought to present to Judge Lowry a Motion for Modification of the March 26, 1976, Ex Parte Order, which removed the children from the custody of their parents. The Motion to Modify was not heard by the Court, even though Section 17.06 of the Texas Family Code states that the court shall conduct a hearing on the motion of a parent, managing conservator or guardian. The parties appeared, however, the judge was not present. In fact, the Judge's clerk refused to allow Appellees' attorney to file the motion. The motion was returned to the parents' attorney. The parents were effectively denied access to the Court.

A hearing on a Writ of Habeas Corpus was held April 5, 1976. That was the first and only opportunity afforded the parents to appear before the Court. On that same date, Judge Lowry, of Harris County, Texas, issued an Ex Parte Order for Montgomery County, Texas, pursuant to Chapter 11 Section 11.11 of the Texas Family Code (1975). The Judge's Order setting the hearing in Montgomery County was entered in blank and still remains blank. A petition was not filed in Montgomery County until May 14, 1976. That petition involved only Paul Sims, one of the minor children. The parents were not given notice, nor was citation or process of any kind served upon them, although required by Chapter 11, Section 11.09 of the Texas Family Code (1975)[2]. The Sims were not afforded a hearing in Montgomery County. During the entire forty-two (42) day period, the children remained in the custody of the Harris County Child Welfare Unit.

Harris County Child Welfare showed bad faith in filing a second petition seeking Ex Parte relief in Harris County

2. "SECTION 11.09
Citation and Notice
(a) Except as provided in Subsection (b) of this section, the following persons are entitled to service of citation on the filing of a petition in a suit affecting the parent-child relationship:
(1) The managing conservator, if any;
(2) possessory conservators, if any;
(3) person, if any, having access to the child under an order of the court;
(4) persons, if any, required by law or by order of a court to provide for the support of a child;
(5) the guardian of the person of the child, if any;
(6) the guardian of the estate of the child, if any;
(7) each parent as to whom the parent-child relationship has not been terminated or process has not been waived under Section 15.08(c)(2) of this code. . . ."

after being present at the hearing where Judge Lowry refused to hear the Sims' Writ of Habeas Corpus because of lack of jurisdiction.

B. INJURY THAT IS GREAT, IMMEDIATE, AND IRREPARABLE, CONSTITUTING HARASSMENT

The Sims and their children suffered both actual and the threat of great, immediate and irreparable injury.

1. Actual Injury

(a) The interest sought to be protected by the state in this instance does not warrant the infringement of Appellees' rights of family unity, due process, integrity, privacy and mutual association which are guaranteed by the United States Constitution. The right to a familial relationship was unjustifiably interferred with by the state in that the Sims family was separated for forty-two (42) days. This unwarranted, prolonged separation has caused great, immediate and irreparable damage to the family unit. This Court has long recognized the fundamental rights of family relationship and integrity and has sought to protect that relationship, *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guaranty and Liability Insurance Co.*, 391 U.S. 72 (1968); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 231 U.S. 158 (1943); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *May v. Anderson*, 345 U.S. 528 (1953).

(b) Chapter 17, section 17.01 of Title Two (2) of the Texas Family Code (1975) which deals with taking possession of children in an emergency states that "an

authorized representative of the state Department of Public Welfare, a law enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle, whether or not the court has continuing jurisdiction under 11.05 of this code." The foregoing section was relied upon by Appellants when they took custody of the children on March 25, 1976. There was no justification for Appellants' actions which perpetuated the irreparable injury suffered by the family in denying it due process. Section 17.01 is still in effect and can be used in emergency situations.

(c) The accumulation and dissemination of information regarding the family as recorded in The Child Abuse and Neglect Report and Inquiry System hereinafter referred to as CANRIS constitutes an actual injury suffered. The Sims had no means of challenging or correcting the information stored in the computerized banks. Such information recorded with no opportunity to be challenged or corrected not only constituted an invasion of privacy but also a denial of due process.

(d) The Sims family suffered irreparable harm in that they were not given notice, served with process, or accorded a hearing.

(e) The Sims were faced with suits pending in both Harris and Montgomery Counties. The duplicity of suits caused irreparable injury in that they denied the Sims a meaningful forum for litigation.

(f) Paul, Shawana and Sabrina Sims, the children, suffered irreparable injury in that the State did not re-

quire an appointment of an attorney to protect their interests which are separate and apart from those of the parents and the state. This Court has recognized the need for protection of fundamental rights of minors from the beginning of the judicial process; *In Re: Gault,* 387 U.S. 1 (1967). The children were separated from their family and from each other, and put in foster care facilities by the state, without benefit of an attorney to represent their interests. Although, the Court maintained custody of the children, denied a modification hearing requested by the parents pursuant to Section 17.06, denied the parents a hearing within ten (10) days after the signing of the Ex Parte Order; the Court refused to act on the Writ of Habeas Corpus, stating a lack of jurisdiction. The Court then transferred the case from Harris County to Montgomery, a different county. Section 11.06 of the Texas Family Code does permit transfers of such cases, however, the requirement that the motion be timely filed by a party other than Petitioner was not fulfilled.

(g) Further, that the Sims' First Amendment right to petition the Court for redress of grievances was denied. The State District Court's refusal to hear a motion for modification, a Writ of Habeas Corpus, and the Texas Court of Civil Appeals' refusal to hear a petition of Writ of Habeas Corpus presented to it also constituted irreparable injury.

2. Threatened Injury

Each and every one of the actual injuries stated above poses a threat of irreparable injury which is both great and immediate.

(a) The fact that an action is still pending allows child welfare officials to initiate an action to terminate the parental rights of the Sims as threatened by Rex Downing, social worker and employee of Child Welfare.

(b) In this case, just as in *Allee v. Medrano,* 416 U.S. 802 (1974), there is a great possibility that the conduct complained of could reoccur.

(c) The fundamental rights of the family unit and integrity is continually threatened by the possibility of removal, separation and denial of due process.

(d) The threat of amending the suits pending in State Court from those affecting the parent-child relationship, a petition to terminate parental rights as threatened by Harris County Welfare raises the threat of reoccurrance of the same due process injuries already suffered by the Sims.[3]

(e) The injury caused by the accumulation and dissemination of information by CANRIS poses a continuing threat of interference with fundamental rights of the family unity.

(f) The threat that the state would return to its practices of not appointing an attorney to represent the interest of the children would continue, thus constituting irreparable injury, as the state failed to appoint an attorney although permitted to do so by Chapter 11, Sections 11.10 and 11.11 of Title Two (2) of the Texas Family Code.[4]

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3. Rex Downing's statement that he would seek termination of parental rights as a part of the Montgomery County action—Sims, A. 78.

4. Section 11.10(c) states "the court may appoint an attorney for any party in a case which it deems representation necessary to protect the interest of the child who is the subject matter of the

(g) Appellants' conduct constitutes an unwarranted inhibition of the ability of the Sims to function as a family. *Dombrowski v. Pfister,* 380 U.S. 479 (1965), emphasized the importance of protecting fundamental rights. The deprivation of custody prior to the civil proceedings is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the State proceeding, *Newton v. Burgin,* 363 Federal Supp. 782 (W.D.N.C.) (1973) aff'd. 414 U.S. 1139 (1974).

The manifest bad faith, the great, immediate and irreparable injuries as discussed herein constitute harassment.

3. The Statutes Involved

The provisions of the Texas Family Code relied upon by the State presents a statutory scheme which is unconstitutional.

The following Sections of the Texas Family Code were found to be unconstitutional as applied:

a) 11.11(a)(4), 34.05(a). The Federal District Court found the following: "That the use of Section 11.11(a)(4) in conjunction with Chapter 17, of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days, measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

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suit". Appellees maintain that the separate interest of the child is one of which representation is necessary.

Section 11.11 allows the court to "make any temporary order for the safety and welfare of the child." Appellees maintain that an appointment of an attorney to represent the child would be in the best interest, safety and welfare of the child.

The use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title Two (2) of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals, prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision."[5]

The above sections as applied denied Appellees their rights to notice, a hearing and service of process in that the State Court relied upon those sections when it issued the two (2) Ex Parte Orders. The family's fundamental rights which are guaranteed by the Fourteenth (14th) Amendment of the United States Constitution, applicable to the states through the Fifth Amendment, were denied, *Watson v. Buck,* 313 U.S. 387 (1941).

Further that the statutes as applied constitute an exception to the abstention doctrine because of:

(1) the confusion involved in this case,

(2) the procedural irregularities, and

(3) the absence of a fair opportunity for Appellees to fairly pursue their constitutional claims in an on-going state proceeding, *Younger v. Harris,* (supra), *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Judice v. Vail,* 430 U.S. 327 (1977); and *Gibson v. Berryhill,* 414 U.S. 564 (1963).

(b) The Federal District Court found the following in relationship to Sections 11.10, 11.15, 17.02, 17.03, 17.05, 34.05 and 34.08 of the Texas Family Code (1975).

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5. See article 12 A-102 and 103 of Appendix.

(1) "That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15 and 17 of Title 2 of the Texas Family Code in which the State is a party.

(2) That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15 and 17 of Title 2 of the Texas Family Code.

(3) That Section 17.02 is unconstitutional on its face insofar as it fails to require that the Ex Parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

(4) That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the Ex Parte hearing to be held immediately after possession of a child is taken by the State.

(5) That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

(6) That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the Ex Parte Order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

(7) That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid the investigation of the abuse or neglect before such an order is obtained.

(8) That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

(9) That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation, *Sims v. State Department Of Public Welfare,* 438 F. Supp. 1188 (1977), hereinafter referred to as *Sims.*

One of the functions of the state is to protect the family unit. Statutes, policies, and practices such as those above which permit unjustified interference with the family unit by the state have been found to be unconstitutional by this Court, *Stanley v. Illinois,* (supra); *Levy v. Louisiana* (supra); *Alsager v. Dist. Court of Polk County, Iowa,* 406 F. Supp. 10 (8th Cir. 1975); *Pierce v. Society of Sisters,* (supra); *Skinner v. Oklahoma,* 316 U.S. 35 (1942); *Prince v. Massachusetts,* (supra).

(c) Abstention would not be proper as the statutes under which the State prosecuted this cause are "flagrantly and patently violative of federal constitutional requirements." This cause is an exception to the abstention doctrine in that the statutes involved in this case were relied upon in bringing about an unwarranted intervention with fundamental rights, just as those involved in *Watson v. Buck,* (supra).

(d) This court held in *Huffman v. Pursue, Ltd.,* (supra) that abstention would not be proper where there were extraordinary circumstances which would justify federal intervention. Those circumstances are:

(1) a justification for early intervention,

(2) a finding that the state proceeding was conducted with an intent to harass or in bad faith, and

(3) a finding that the statutes challenged were flagrantly and patently unconstitutional.

The justification for early intervention in *Sims* is that there is no adequate remedy at state law, as Appellees' every effort, to obtain judicial relief in State court was either frustrated or denied. The State proceedings were conducted with intent to harass and in bad faith; further that the statutes were found to be flagrantly and patently unconstitutional, in that the requirements of the Due Process and Equal Protection Clauses of the Fourteenth (14th) Amendment of the United States Constitution were not met.

(e) The doctrine as put forth by this Court in *Railroad Commissions of Texas v. Pullman Co.,* 312 U.S.

496 (1941), does not apply. This Court held that abstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a State Court determination of pertinent state law.

(f) This Court held in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), that abstention is appropriate in cases presenting difficult questions of state law bearing on policy problems of substantial public importance whose importance transcends the results in the case before the court. The instant case does not involve a complicated, administrative decision-making process.

(g) *Newton v. Burgin,* (supra) hereinafter, referred to as the *Newton Doctrine* or the *Newton Court,* involved an action for declaratory judgment that a child's seizure was unconstitutional and that a "five day" period under a statute providing that if the child appears to be in danger, subject to such serious neglect as may endanger his health or morals or the best interest of the child requires that the court assume immediate custody of the child prior to the hearing; a parent can be deprived of custody for at least five (5) days before a hearing is held unconstitutional. The Three-Judge Federal District Court, Gordon, Chief Judge, held that it would not be appropriate for such court to abstain from determining constitutionality in order to give state courts a chance to interpret the statute.

Whereas, the *Newton Court,* held that abstention was warranted in a case where a parent was deprived of her child for five (5) days pursuant to a state statute, the case at bar presents a situation where the parents were deprived of all three (3) of their children for a period

of forty-two (42) days without benefit of an adversary proceeding. Furthermore, the *Newton Court* found that the two-day (2) deprivation was sufficient to justify federal intervention.

The case at hand is an exception in that it was not barred by the anti-injunction provisions of 28 U.S.C. § 2283 (1948). This action was filed pursuant to 42 U.S.C. § 1983 which is not barred by 28 U.S.C. § 2283; further that 42 U.S.C. § 1983 is an exception to the *Younger doctrine.* In addition, 28 U.S.C. § 2283 (1948) was not repealed at the time the Sims action was filed.

II

THE ISSUES IN THE CASE AT HAND PRESENT A CASE OR CONTROVERSY.

This Court has declared that the federal courts are constrained by Article III of the United States Constitution to decide only cases between actual, adverse litigants, *Richard v. Ramirez,* 418 U.S. (1974); *O'Shea v. Littleton,* 414 U.S. 488 (1974); *Flast v. Cohen,* 392 U.S. 83 (1968). The doctrine of mootness is jurisdictional and arises in cases such as *Sims* where Plaintiffs' request injunctive or declaratory relief. It is well settled that an action for injunctive relief does not become moot merely because the conduct complained of has terminated; or if there is a possibility of reoccurrence, as otherwise the Appellants would always be free to return to their wrongful conduct, *Allee v. Medrano,* (supra).

The following are reasons why the case at bar presents a case or controversy:

(1) The unconstitutional application of the state statutes to the Sims family,

(2) The prosecution by the State wherein it relied upon statutes which were found to be not only flagrantly and patently violative of constitutional requirements but unconstitutional on their face,

(3) The denial of due process by the state as guaranteed by the Fourteenth (14th) Amendment of the United States Constitution, and

(4) The fact that the State failed to accord the Sims a hearing and denied them access to the Courts, and the practice of the state in failing to appoint an attorney to represent the separate interests of the children.

The Appellants did not cease their wrongful conduct until ordered to do so by the Federal District Court. Therefore, how can Appellants now assert that this case is moot. There is always a great possibility of reoccurrence of the same conduct and practices by the State, as actions are still pending in state court and Child Welfare's threat to pursue termination of the Sims' parental rights. Aggrieved persons in cases such as these would never be able to seek redress of grievances if the State is permitted to render a case moot by merely voluntarily returning a child or returning children when ordered to do so by a court.

In this case, just as the circumstances in *Roe v. Wade,* 410 U.S. 113, suits affecting the parent-child relationship instituted by the State seeking conservatorship (custody) or termination "provides a classic justification for a conclusion of non-mootness." It could truly be "capable of repetition yet evading review," *Southern Pacific Terminal Company v. I.C.C.,* 219 U.S. 498 (1910); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 1951 (1968); *DeFunis v. Odegaard,* 416 U.S. 312

(1974). Further that the great, immediate and irreparable injuries suffered by Appellees continue and are likely to reoccur unless this Court addresses the merits of the case.

The essential controversy, which is the great, immediate and irreparable injuries and the wrongful conduct as discussed herein is not moot but very much alive. *Gray v. Sanders,* 372 U.S. 368 (1963); *Walling v. Helmerich,* 323 U.S. 37, (1944) and *United States v. W. T. Grant,* 345 U.S. 629 (1953).

Another view of what constitutes justifiable controversy was set forth by this Court in *Roe v. Wade,* (supra), when this Court held that Ms. Roe, whose pregnancy had been terminated by the time that the case was heard on the merits, had standing to undertake the litigation, and that she presented a justifiable controversy. This Court also stated that the termination of her pregnancy did not render her cause moot.

Equitable relief was proper in this instance and the case at hand was not moot at the time of the hearing on the merits. As there was both an adequate showing of responsibility and causal connection between Appellants' contact and the injury alleged from the time that Appellants summarily seized the minor Appellees until relief was granted by the Federal District Court in its decision of October, 1977. This cause has not been rendered moot. The facts in this case just as those in *Roe v. Wade,* (supra), illustrate a classic example of non-mootness. A somewhat lesser exception was recognized in *Dyer v. Securities and Exchange Commissions,* 251 2d 512 (8th Cir. 1958), rev'd. 359 U.S. 499, in light of—266 F.2d 33 (8th Cir. 1959); the mootness

doctrine was viewed with slightly less strict standards; where the case involved the challenging of governmental actions, regulations, standards and statutes as in *Sims*. Further that the actions by Appellants, under color of law, against Appellees are evidence of a governmental custom and policy which seriously injures Appellees and deprives them of constitutional rights. *Rizzo v. Goode,* 423 U.S. 362 (1976), *Monroe v. Pape,* 365 U.S. 167 (1961) and *Monell v. Department of Social Services of the City of New York,* ____U.S.____, 46 L.W. 4569 (June 6, 1978). In *Sims* as in *Sosna v. State of Iowa,* 419 U.S. 393 (1975), there existed a case or controversy between the parties when the complaint was filed and the case still presents an actual and live controversy.

III

A. Due Process and Equal Protection

The Fourteenth Amendment of the United States Constitution guarantees citizens the right to due process of and equal protection before the law.

As defined by this Court and other judicial tribunals, due process under the Fourteenth Amendment of the United States Constitution is affording individuals a meaningful opportunity to be heard at critical stages in proceedings involving the deprivation of privileges, liberties, immunities and fundamental rights. Equal protection embodies the notion of providing individuals equal justice before the law.

The parent-child relationship, that is, the right of family unity, relationship, integrity, due process, equal protection, privacy and mutual association clearly falls within those rights that have been deemed essential and basic

rights far more precious than property rights, therefore protected by the Ninth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment (14th) of the United States Constitution. Therefore, the parent-child relationship is not subject to unwarranted State intrusion. By way of illustration but not limitation, the following is an overview of case law:

In *Meyer v. Nebraska,* (supra), this Supreme Court found the right of parents to have their children study the German Language was a protected First Amendment right, stating, at P. 399:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also . . . the right . . . to marry, establish a home and bring up children . . ." [emphasis added.]

In *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), this Court stated that the right to educate one's children as one chooses was made applicable to the States by force of the First and Fourteenth Amendments, and the Court stated:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . the child is not the mere creature of the state; those who nurture him and direct his destiny have the right . . . [and] duty to recognize and prepare him. . . ."

In *Skinner v. Oklahoma,* 316 U.S. 35 (1942), this Court recognized the rights to marry and procreate as "basic civil rights of man," and struck down a state statute authorizing sterilization of habitual criminals.

In 1943, faced with a situation of State intervention as *parens patriae* involving the welfare of children in *Prince v. Massachusetts,* 231 U.S. 158 (1943), the Supreme Court held:

> "It is cardinal with us that the custody, care and nuture of the child reside first in the parents whose primary function and freedom include preparation for obligations the State can neither supply nor hinder * * * and it is the recognition of this that these decisions (*Meyer* and *Pierce*) have respected the private realm of family life which the state cannot enter."

May v. Anderson, 345 U.S. 528 (1953), held a parent's "immediate right to the care, custody, management and companionship of . . . minor children" to be "one of the most precious of personal liberties."

Stanley v. Illinois, 405 U.S. 645 (1972), struck down an Illinois dependency and neglect statute which deprived unmarried fathers of the care and custody of their natural children upon death of their mothers, holding that the right of parents to have custody and management of their children is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and by the Ninth Amendment.

> "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man', and 'rights far more

> precious than property rights.' It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment." [Citation omitted.] 345 U.S. 528 (1953).

Roe v. Conn., 417 F.Supp. 769 (M.D. Ala.) (decided July 6, 1976) cites and follows *Alsager v. District Court of Polk County, Iowa,* 406 F.Supp. 10, (8th Cir. 1975), and is the most recent decision known to Appellees dealing with the fundamental freedoms of the parent-child relationship:

> "A district court in Iowa recently reviewed the long line of Supreme Court cases addressed to the constitutional interests at stake where various aspects of family life are threatened and concluded there is a fundamental right to family integrity protected by the Fourteenth Amendment to the United States Constitution." *Alsager v. District Court of Polk County, (supra)*

A more recent Supreme Court decision, *Cleveland Board of Education v. LaFleur,* 416 U.S. 791 (1974), reaffirms the constitutional nature of this interest: 'freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' In addition to the 'liberty' concept of the Fourteenth Amendment, the Supreme Court has been equally solicitous of the family enclave under the doctrine of privacy. See *Griswold v. Connecticut,* 380 U.S. 1678 (1965); *Eisenstadt v. Baird,* 405 U.S. 438, (1972), *Roe v. Wade, (supra).*

Furthermore, Appellees acknowledge that the state has a legitimate interest in protecting children.

Courts must decide on a case by case basis what constitutes due process, and in the instant case, due process becomes a balancing of the foregoing competing interests: The interests of the children, the parents and the state.

The Equal Protection Clause of the Fourteenth Amendment (14) as interpreted by this Court dictates that the interests of the child, parent, and state come before it on equal footing in terms of adequate notice, right to counsel and standard of proof, *In Re: Gault,* 387 U.S. 1 (1967), *Levy v. Louisiana* (*supra*) and *Stanley v. Illinois* (*supra*).

This Court has been equally solicitous and protective of the family unit under the doctrine of privacy, *Stanley v. Illinois,* (*supra*); *Griswold v. Connecticut,* (*supra*); *Eisenstadt v. Baird,* (*supra*); and *Roe v. Wade,* (*supra*).

B. Due Process, Equal Protection And The Ninth Amendment As Applied In The Instant Case.

Whereas the law protects the rights of individuals to their property and benefits, the Texas statutes in question fail to protect the rights of the family, the child and the parent, for example, this Court held that recipients were entitled to a hearing prior to termination of welfare benefits in *Goldberg v. Kelly,* 397 U.S. 254 (1970); further that in *Bell v. Benson,* 402 U.S. 535, (1971), this Court required a hearing and inquiry into the potential liability of a license holder prior to suspension of drivers licenses under provisions of a State Safety Responsibility Act. This Court has held that an individual's parole may

not be revoked without a hearing conducted before an impartial body as soon as possible after the alleged violation, *Morrissey v. Brewer,* 408 U.S. 471, (1972).

The Court has recognized the importance of according individual a hearing as in *Goss v. Lopez,* 419 U.S. 565 (1975). This Court held that students suspended from school under authority of a state statute permitting suspensions for misconduct for one to ten days had a property interest protected by the Due Process Clause which required notice of the charges and an opportunity to reply before or as soon as practicable after expulsion.

The decision rendered in *Fuentes v. Shevin,* 407 U.S. 67 (1972), struck down the Florida and Pennsylvania replevin statutes as unconstitutional because they permitted a deprivation of property without due process of law in that the statutes involved denied the Plaintiffs a hearing prior to seizure of their chattel.

Appellees respectfully maintains that this Honorable Court should afford parents and children as much consideration as given Ms. Fuentes and her stove as well as a situation involving an individual's suspension from school, revocation of parole, suspension of drivers licenses and termination of welfare benefits.

Appellees respectfully submit that Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c) and 34.08 are unconstitutional on their face, further that sections 11.11 (a)(4) when used in conjunction with Chapter 17 and section 34.06 are unconstitutional.

Section 11.10. This provision deals with the appointment of a guardian ad litem. As stated herein, due process among other things, constitutes a meaningful op-

portunity to be heard. This Court has declared that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel," *Powell v. Alabama,* 287 U.S. 45 (1932). Furthermore this Court has recognized the need for protection of the separate interests and rights of minors from the beginning of a legal proceeding. Section 11.10 on its face does not accommodate the possible and natural conflict between interests of child, parent and state and therefore denies due process in that it does not mandate the appointment of an attorney to represent the interest of the child. The lack of such a requirement effectively denies the child a meaningful opportunity to be heard and denies him equal justice before the law.

Section 11.15 presently provides that the standard of proof in suits affecting the parent-child relationship shall be a preponderance of the evidence. In other words, a mere finding of a preponderance of the evidence is the standard of proof relied upon for everything from temporary deprivation, all the way to termination of parental rights. Any intrusion by the State in the parent-child relationship involving the fundamental rights discussed above should at the very least require a standard of clear and convincing evidence. There is authority for the proposition that the standard be clear and convincing evidence. Those authorities are found below:

While the case at hand is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, the Sims like young Samuel Winship "have an interest of transcending value" at stake, *In Re: Winship,* 397 U.S. 358 (1970). The Iowa court held that the fundamental and essential right to family integrity requires, at the

very least, that the State notify parents of the allegations and prove its case by clear and convincing evidence, *Alsager v. District Court of Polk County, Iowa,* (supra). As summarized in the earlier discussion of family integrity, the right of a familial relationship and protection of that relationship is fundamental, *Alsager v. District Court of Polk County, Iowa* (supra); *Roe v. Connecticut* (supra); *Stanley v. Illinois,* (supra); *Prince v. Massachusetts,* (supra); *Pierce v. Society of Sisters,* (supra); *Meyer v. Nebraska,* (supra); *May v. Anderson,* (supra); *Levy v. Louisiana,* (supra) 1509 (1968); *Golona v. American Guaranty and Liability Insurance Co.,* (supra). The fundamental rights involved in termination cases and suits affecting parent-child relationships are equal to and of the same import as rights of juveniles involved in *In Re: Gault* (supra); *In Re: Kelly,* 262 N.W.2d 781, (Iowa, S. Ct., 1978); the Iowa Supreme Court held that the trial court was proper in applying the standard of clear and convincing evidence as a standard of proof. *In the Interest of Eric Hambelton,* 574 P.2d 982, (Court of Appeals of Kansas) (1968), the court held that a parent could not be deprived of her children unless the standard of proof was clear and convincing evidence. Clear and convincing evidence was held to be the standard of proof in *The Matter of the Guardianship of R.G. & F.,* 382 A.2d 654. (N.J. S.Ct.) (1977).

In *In Re: William L.,* 383 A.2d 1228, (Penn. S. Ct.) (1978), the Court stated that, "an ongoing relationship in the home will not be disturbed except upon a showing by clear and convincing evidence and that removal is clearly necessary."

Clear and convincing evidence was also found to be the proper standard of proof *In The Interest of Gray,*

353 So. 2d 393, (La. App.) (1977), and *In The Interest Of Gates,* 373 N.E. 2d 568, (Ill. 1978). The cases cited above show, that once a right has been deemed to be "fundamental," due process would demand at the very least, a standard of proof consisting of clear and convincing evidence. The retention of a preponderance of the evidence as the standard of proof rather than requiring that a showing be made by clear and convincing evidence in suits to terminate or affect parental rights where the State is the moving party, would constitute a denial of due process as required by the 14th Amendment of the United States Constitution.

Section 17.02. Presently provides that a petition should be filed immediately after a child is taken into possession and delivered to the Court. This provision is not to be relied upon if the child is taken into custody pursuant to Section 11.11.

This section 17.02 provides that, unless the welfare, law, or juvenile officer is acting pursuant to Section 11.11, the officer shall immediately file a petition upon delivery of the child to the Court. The Court then shall conduct a hearing to provide for the temporary care and protection of the child.

The Sims children were not delivered to the Court pursuant to Child Welfare's usual practice of not actually delivering children to the Court. The statute denies the parties due process in that it does not require that the hearing itself be held immediately. Since the Sims children were already in the possession of Harris County Child Welfare, there was no reason for the Court not to provide the parties with an immediate hearing. In fact, the statute does not even mention within what time period a hearing

should be conducted, therefore it is arbitrary and capricious thus constituting a denial of due process. This section also violates the Equal Protection Clause of the Fourteenth (14th) Amendment as it assumes that children who are taken into possession are in need of temporary care and protection without a judicial determination.

17.03 This section provides that a hearing may be held pursuant to section 17.02 without notice to the parents. This section constitutes a flagrant denial of due process in that it deprives children and parents of fundamental rights. Minimal due process requires notice to the parents that the children have been summarily seized, that an action has been instituted and notice of the grounds for seizure of the children. The foregoing also constitutes a denial of equal protection for children and their parents in that they once again are not on equal footing before the Court with the State and all its resources.

Section 17.05. This section provides that an Ex Parte Order issued pursuant to Section 17.04 expires at the end of the ten (10) day period following the date of such order or upon restoration of the child to the parents or upon the issuance of ex parte temporary orders. This section further provides that a court can direct child welfare to file a suit affecting parent-child relationship, in the event that possession is not restored to the parents. In the instant case, the State District Court failed to restore possession to the parents and did not provide an adversary hearing. The Court instead issued a second ten (10) day Ex Parte Order thus prolonging the deprivation. The Court's actions were violative of the Sims family rights guaranteed by both the Due Process and Equal Protection Clauses of the

Fourteenth Amendment (14th), in that the state stacked the Ex Parte Orders, effectively intruding upon the family unit for at least twenty (20) days without providing the family with any hearing.

Section 17.06. This section provides that the Court shall conduct a hearing upon motion of a parent whose rights were affected in a prior emergency order. The Court may, after a hearing, modify its earlier order if it finds that modification of the ex parte order is in the best interest of the child. This section violates the Sims' right to due process and equal protection in that it places an unfair burden upon the parents to come forth and show cause why the ex parte order should not continue in full force and effect when constitutionally the burden is upon the State to justify any deprivation. In this case the Sims were not even given an opportunity to file their motion and have a hearing pursuant to this section.

Section 34.05(c). This subsection provides that the Welfare investigation conducted after referral pursuant to section 34.01 and 34.05 shall include a home visit, a physical and psychological or psychiatric examination of all the children in the home, and an interview with the subject child. If parents deny child welfare permission to conduct the foregoing, the agency may then request the court, upon cause shown, to order the parents to allow access to conduct an investigation. This section violates the Sims' rights as guaranteed by the Ninth and Fourteenth Amendments of the United States Constitution.

The Sims' Ninth (9th) Amendment right to privacy was violated as Child Welfare was not only permitted to conduct its investigation but could also obtain a

court order directing such unbridled intrusion without consent and any type of hearing. Due process and equal protection was once again denied the Sims in that Child Welfare conducted its investigation without notice and a hearing. Appellees maintain that the Constitution mandates that due process and equal protection extend to this type of investigation conducted by the State.

Section 34.08. This section provides that all reports, records, documents and any other information compiled in an investigation by Child Welfare are confidential and may only be disclosed pursuant to agency regulations.[6]

The investigation is an adversary proceeding as information gathered is relied upon in removing children from the home. Appellees acknowledge the importance of investigating reports of abuse, however, there is no justification for the States' denying individuals access to the results of the investigation. Due process requires that parties be apprised of the grounds that an action is initiated upon, further that equal protection and those rights guaranteed under the Sixth (6th) Amendment of the United States Constitution require access to the results of the investigation.

The Three-Judge District Court found that Sections 11.11(a)(4), used in conjunction with Chapter 17 of Title Two of the Texas Family Code and 34.06 are unconstitutional as applied. 11.11(a)(4). This sub-section provides that a Court may issue any temporary orders

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6. § 34.08
Confidentiality
The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency. Added by Acts 1975, 64th Leg., p. 1272, ch. 476 § eff. Sept. 1975.

in suits affecting the parent-child relationship for the protection of the child, including the Court's taking the child into possession or giving possession to a court designated individual. Chapter 17 which is discussed above was relied upon in conjunction with 11.11(a)(4) by the State Court in the case at hand. The foregoing conjunctive application of those sections in the instant case, where the state court stacked the Ex Parte Orders, infringed upon the Sims Family's reciprocal fundamental rights to privacy, a familial relationship, integrity, and mutual association without providing any hearing. In fact, the state court through its actions initiated a proceeding which ultimately resulted in a forty-two (42) day separation of the Sims family.

Section 34.06. This provision authorizes the establishment by the Texas Department of Human Resources of a central registry for the collection and dissemination of information and referrals concerning child abuse and neglect. This registry known as CANRIS unconstitutionally invaded the privacy of the Sims family in that information gathered was disseminated without the consent of the family. CANRIS as applied in the instant case also has violated the Sims' rights to due process and equal protection as they were labeled as child abusers without benefit of a judicial determination. In other words, CANRIS, as applied, assumes that any one who is referred or reported is automatically a child abuser by the very fact that a referral was made.

The Sims family maintains that the action taken against them by Appellants was unjustified and that their only adequate remedy at law was to petition the Federal District Court for redress of the profound grievances which they suffered.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Three-Judge District Court as to proper jurisdiction and the holding on the merits of Appellees' cause of action.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants,

vs.

JOHN PLEASANT SIMS, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants,

vs.

JOHN PLEASANT SIMS, et al.,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

BRIEF AMICUS CURIAE FOR WANDA DIXIE, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW

INTERESTS OF AMICI CURIAE[1]

Amicus Curiae Wanda Dixie is the mother of five minor children, Shelly, Leslie, Diana, Billie and Tammy. The Dixie family are plaintiffs in *Dixie v. Meier,* (W.D. Tex. Austin Div. Civil No. A-77-CA 229, filed Dec. 8, 1977), a suit for declaratory relief and damages pending in the Western District of Texas.

[1] Written consent for the filing of this Brief *Amicus Curiae* in the form of letters from counsel both for Appellants and for Appellees, pursuant to Supreme Court Rule 42(2), have been filed with the Clerk of the Court.

Defendants in *Dixie v. Meier* are agents of appellant Texas Department of Human Resources who allegedly seized and removed the children from their mother's home without notice and an opportunity to be heard. It is alleged in *Dixie* that the children were held in custody for more than seven months before the Department obtained an emergency *ex parte* order to retain custody of the children, and that no hearing was held during that time period at which Wanda Dixie could contest the removal of her children.

The plaintiffs in *Dixie* have a direct interest in the outcome of this litigation. As in the case *sub judice*, their claim is based on the contention that due process of law as guaranteed by the fourteenth amendment to the United States Constitution requires a prompt post-removal hearing to determine the propriety of the children's seizure.

The National Center for Youth Law, formerly the National Juvenile Law Center of St. Louis, Missouri, and the Youth Law Center of San Francisco, California, is a national legal services support center funded by the federal Legal Services Corporation for the express purpose of protecting the rights of indigent parents and their children. Center attorneys have appeared as counsel before this Court in cases dealing with juvenile court proceedings [*Breed v. Jones*, 421 U.S. 519 (1975); *The Oklahoma Publishing Co. v. The District Court of Oklahoma County*, 430 U.S. 308 (1977)] and with public education [*Lau v. Nichols*, 414 U.S. 563 (1974)]. Moreover, Center attorneys have studied numerous model abuse and neglect statutes and are familiar with the statutory provisions of many jurisdictions. The Center also appeared as *amicus curiae* in the District Court in the present action. (Brief filed August 1976.) The Center believes that its continued participation in this litigation will assist the Court in deciding the important issues raised by this appeal.

SUMMARY OF ARGUMENT

This Court has "frequently emphasized the importance of the family" in American life. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents have transcending interests in the custody of their children, and children have a reciprocal interest in maintaining the integrity of the family unit. Thus, when the state intrudes in that relationship "this Court must examine carefully the importance of the governmental interests advanced." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977).

After an allegedly abused or neglected child is seized by the state, Texas law requires that a hearing be commenced to determine whether the child should remain in custody or returned home pending a full adversary hearing. TEX. FAM. CODE ANN. §17.02. The court below held that "barring unusual circumstances" this hearing should take place not "beyond the very day of seizure." *Sims v. State Dept. of Public Welfare, Etc.*, 483 F.Supp. 1179, 1193 (S.D. Tex. 1977). *Amici* submits that only by holding such a prompt post-removal hearing can due process be satisfied.

"The very fact of removal from even an inadequate natural family is often traumatic for the child." *Smith v. O.F.F.E.R.*, 431 U.S. 816, 837, n. 40 (1977). Child development experts frequently disagree as to whether a child's interests are served best by removal, and the data indicates that many children are improperly removed from their homes. Thus, it is imperative that a prompt hearing be held "to minimize substantively unfair or mistaken" seizures of children from their parents. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

At the post-removal hearing due process mandates that an attorney be appointed to advocate the interests of the child.

Conflicts between parent and child, as well as conflicts between state and child, can only be minimized by separate representation for the child.

Further, the standard of proof in all court proceedings which might result in removal of a child should be "clear and convincing evidence." A "preponderance of the evidence" standard does not provide a test rigid enough to prevent unnecessary disruptions of the family.

Finally, the court below did not err in its refusal to apply the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), to the case *sub judice*. In *Gerstein v. Pugh*, 420 U.S. 103, 108, n.9 (1975), the Court held that absention was improper in a case virtually identical to the instant case. In both cases, the injunctions were not directed at the state prosecution as such, but rather challenged only the legality of pre-adjudication detention, an issue that could not be raised in defense of the prosecution. The injunction here, as in *Gerstein*, in no way could prejudice the trial on the merits. Therefore, it was proper for the lower court to provide a forum in which the parties could present their constitutional claims.

ARGUMENT

I

The Due Process Clause of the Fourteenth Amendment to the United States Constitution Requires That a Hearing Be Held Immediately After the State Intrudes on the Privacy of the Family Unit.

A. Introduction

It is necessary to clarify at the outset the limited scope of the issues regarding hearing rights presented to this Court. The three-judge court held that a full adversary hearing must be commenced within ten days of the seizure of the child, 438 F. Supp. at 1193, and that counsel must be appointed to represent the child at that adversary hearing. 438 F.Supp. at 1194. None of the parties in this action challenge these holdings. Jurisdictional Statement at 37, 39 (hereinafter "J.S."); Appellant's Brief at 40-42 (hereinafter "A.B.").

The "hearing" at issue in this appeal is the initial post-removal hearing required by TEX. FAM. CODE ANN. §17.02 which may be held *ex parte*. The Texas Family Code permits law-enforcement or juvenile probation officers to take possession "of a child to protect him from an immediate danger to his health or physical safety." TEX. FAM. CODE ANN. § 17.01.[2] The officer must then "file a petition in the court immediately on delivery of the child to the court, and a hearing be held to provide for the temporary care or protection of the child." TEX. FAM. CODE ANN. § 17.02. This hearing "may be held without notice." TEX. FAM. CODE ANN. § 17.03.

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[2] The three-judge panel upheld this language as representing "a constitutionally adequate standard." 438 F.Supp. at 1192.

With respect to these sections, the three-judge panel first held that "the due process interest of the parent is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court." 438 F.Supp. at 1192-93. "Appellants do not contest this . . . requirement," nor do they challenge the statutory requirement that such a "hearing" be held at some time *prior* to the full adversary hearing. A.B. at 40-41. Rather, they contest only the court's holding that:

> Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this *ex parte* presentation to a judicial authority beyond the very day of seizure.

438 F.Supp. at 1193; A.B. at 41.[3]

Appellants urge that "the governmental agency charged with protecting the children of Texas be allowed a reasonable time (*i.e.*, not the 'very day') to seek judicial approval for the assumption of emergency custody." A.B. at 41. *Amici* do not argue against a "reasonable time rule," nor do we argue against the seizure of children in genuine emergency situations. Rather, we too urge that the *"ex parte"* hearing be held within a "reasonable" time after a seizure. What constitutes a "reasonable time" shall be the focus of this section.

B. Significant Liberty Interests Are at Stake in This Case

The "root requirement" of the due process clause is that an individual be given an opportunity for a hearing *before* he

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[3] The three-judge panel found an additional "constitutional defect" in §17.02:

> Through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"—language which assumes that such care or protection is needed. 438 F.Supp. at 1193.

Appellants do not question this holding. *See* J.S. at 4-6.

is deprived of any significant property or liberty interests "except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Neither appellees nor *amici* suggests that a prior hearing is required in the case *sub judice*. They do submit, however, that even should the summary seizure have been justifiable, the hearing must follow the seizure as soon as "practicable". *See, e.g., Goss v. Lopez*, 419 U.S. 565, 582-83 (1975). For purposes of this appeal, the parents and children urge that the due process clause of the fourtenth amendment requires that an *"ex parte"* hearing be held within twenty-four hours of the seizure to determine whether seized children should remain in custody pending the full adversary hearing or whether the family can be reunited immediately without danger to the children. Motion to Affirm at 35.

In reviewing the requirement that the state must hold an *"ex parte"* hearing within twenty-four hours, or within a reasonable time after the summary seizure, the initial inquiry is whether appellees have been deprived of their constitutional rights by the state's failure to hold such a hearing in this case.

This Court has established a framework for analysis of such due process claims. Initially it must be determined whether appellees have been deprived of "interests encompassed by the fourteenth amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Should such deprivation be found, the Court must next determine "the nature of the process that is due." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

The fundamental interest in familial privacy and integrity, which encompasses the rights of parents to retain custody of their children and of children to the care and protection of their parents, is indisputably one of paramount importance.

This case concerns:

> [T]he most essential and basic aspect of familial privacy —the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and child.

Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

It is a truism that: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the fourteenth amendment." *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 (1977).[4]

The parent has a transcending interest in the "companionship, care, custody and management of his or her children." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Similarly, the children's paramount interests are to maintain the "emotional attachments that derive from the intimacy of daily association" with the parent. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1977).

This Court has on numerous occasions given support to the reciprocal rights of parents and their children:

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[4] "[A host of cases, tracing their lineage to *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); have consistently acknowledged a 'private realm of family life which the state cannot enter.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See, e.g., Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 231-233 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Griswold v. Connecticut*, 381 U.S. 479, *id.*, at 495-496 (Goldberg, J., concurring); *id.*, at 502-503 (White, J., concurring); *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting); *cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)]"

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 500 (1977).

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); 'basic civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and '[r]ights far more precious than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Stanley v. Illinois, 405 U.S. at 651.

Although the family is not beyond regulation:

> [W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation. *See Poe v. Ullman, supra*, 367 U.S. at 554 (Harlan, J., dissenting).

Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 499 (1977).

Because the summary removal of a child from its parents destroys familial integrity, it is essential that the Court carefully examine the propriety of this disruption as soon after its occurrence as is practicable.

C. Due Process Mandates That a Hearing Be Held Immediately After Children Are Removed From Their Family

The determination that liberty interests are implicated by the summary removal of children from their parents is but the threshold inquiry. We must next determine what process is due.

There is no litmus test by which one can automatically determine the requisites of due process. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This Court has accordingly mandated the following form of analysis:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg v. Kelley*, 397 U.S. at 263-71.
>
> *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

1. **Private Interest**

The interests in preserving family integrity have been discussed above. This Court has stated that "the very fact of removal from even an inadequate natural family is often traumatic for the child." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 837, n. 40, citing Wald, *State Intervention on Behalf of "Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,"* 28 STAN. L. REV. 625 (1976). Other experts are in agreement:

> The drastic nature of summary seizure can be seen in the testimony of the experts. Drs. Provence and Solnit state that 'summary removal of a young child from a parent who has been his major caregiver is a severe threat to his development [because] it disrupts and grossly endangers what he most needs, that is, the continuity of affectionate care from those to whom he is attached through bonds of love.' These two doctors believe that summary seizure should be resorted to only when the child's 'physical survival' is at stake. Dr. Robitscher states that summary seizure is justified in his opinion only when the child's physical health and emotional health are at serious risk after all other alternatives to removal have been thoroughly studied.

Roe v. Conn, 417 F.Supp. 769, 778, n. 9 (M.D. Ala. 1976) (three-judge court).[5]

Indeed, even the shortest separation of child from parent constitutes a terrible deprivation, particularly to the infant child:

> Unlike adults, who have learned to anticipate the future and thus to manage delay, children have a built-in time

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[5] "Dr. Sally A. Provence is professor of pediatrics at Yale University Child Study Center and Director of the Child Development Unit, author of Guide to the Care of Infants in Groups (1967), and co-author of Infants in Institutions. . . . Dr. Albert J. Solnit is Sterling Professor of Pediatrics and Psychiatry and Director of the Child Study Center at Yale University. . . . Dr. Jonas Robitscher is a Henry R. Luce Professor of Law and the Behavorial Science at Emory University Schools of Law and Medicine."

Roe v. Conn, 417 F.Supp. at 776, nn. 5, 6, and 7.

See also, Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*, (MacMillan, 1973); Mnookin, "Foster Care—In Whose Best Interest?", 43 HARV.ED.REV. (1973); Seen and Solnit, *Problems in Child Behavior*, (Lea & Febiger, 1968); Freud, *Normality and Pathology in Childhood*, (International Universities Press, 1965); Winnicott, *Mother and Child*, (Basic Books, 1957); Littner, *Some Traumatic Effects of Separation and Placement*, (Child Welfare League of America, 1956); Glickman, "Treatment of the Child and Family After Placement", 28 SOCIAL SERVICE REV. 279 (September 1954); Bowlby, *Maternal Care and Mental Health*, Monograph No. 2 (World Health Organization, 1952); Young, "Placement from the Child's View", 31 SOCIAL CASEWORK 250 (1950); Goldfarb, "Effects of Psychological Deprivation in Infancy and Subsequent Stimulation", 102 AM. J. PSYCH. 18-33 (1945); Ribble, *The Rights of Infants* (Columbia Univ. Press, 1943).

sense based on the urgency of their instinctual and emotional needs. . . .

Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents. He cannot take care of himself physically, and his emotional and intellectual memory is not sufficiently matured to enable him to use thinking to hold on to the parent he has lost. During such an absence for the child under two years of age, the new adult who cares for the child's physical needs is latched onto 'quickly' as the potential psychological parent. The replacement, however ideal, may not be able to heal completely, without emotional scarring, the injury sustained by the loss.

Goldstein, Freud and Solnit, at 40-41.[6]

Similarly, the removal of one's children causes the parent(s) severe grief:

> Obviously, when a parent is deprived of custody, he is likely to suffer intense sorrow and pain. [L]abeling the parent as neglectful and imposing outside supervision and control

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[6] *See also,* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 YALE L. J. 645, 649-50 (1977) (footnotes omitted), cited in *Duchesne v. Sugarman,* 566 F.2d at 825, n.19:

> No other animal is for so long a time after birth in so helpless a state that its survival depends upon continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breaches in the familial bond will be detrimental to a child's well-being. But 'so long as a family is intact, the young child feels parental authority is lodged in a unified body which is a safe and reliable guide for later identification.' Court or agency intervention without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his own right.

> over parental decisionmaking will often result in feelings of shame and fear on the part of the parents.

Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 STAN.L.REV. 985, 996 (1975).

2. **Risk of Error.**

Given the trauma associated with summary removals, procedural safeguards are essential to insure the least risk of erroneous deprivation of parental care consistent with the safety of the child.[7] Because the risk of trauma to the separated child increases with the duration of separation, the procedural safeguards advocated by *amici,* judicial determination of the propriety of the seizure within the next business day after the act and the right to counsel at that determination, (see Sec. II, *infra*), have a greater probable value of eliminating the harmful effects of an erroneous deprivation than a rule which allows several days to elapse prior to a judicial hearing.

Furthermore, once a child is taken away from its natural parent, it becomes increasingly difficult for the parent to regain custody. At the full adversarial hearing, the court will be aware of prior administrative and judicial actions and these cannot help but to color its final determination. Separation of the child will make the parent's and/or child's attorney's job more difficult. Visiting with the child may be a problem, particularly in geographically large areas. Evidence gathering and testing the child, all become more difficult when the child is

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[7] Most commentators have suggested that summary removals are overused. *See, e.g.,* Burt & Balyeat, *A New System for Improving the Care of Neglected and Abused Children,* 53 CHILD WELFARE 167, 168 (1974); Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause,* 4 SUFF. L. REV. 631, 648-49 (1970); Levine, *Caveat Parens: A Demystification of the Child Protection System,* 35 U.PITT.L.REV. 1, 29-30 (1973).

away from home. Thus, the decision as to whether a child is returned to the parents at the initial post-removal hearing may well decide the final outcome of the case. The risk of an erroneous deprivation is not one of a mere ten days duration, *i.e.*, until the full adversary hearing, but rather, one which may have a lasting impact on the integrity of the family. In these circumstances, it is imperative that judicial review be undertaken as soon after the deprivation as is practicable.

Further, the decision to remove a child from its parents versus the decision to leave a child with its parents is a most subjective one. Indeed, the State characterizes it as "not readily quantifiable." A.B. at 44. Placement decisions are inexact determinations and the margin of error is quite high. For example, in one controlled study three professional child welfare specialists reviewed the placement decisions in 50 cases, involving 94 children, whose families were believed to be in need of some form of family services. The experts made individual determinations which children should have been removed from their parents and which should be given supportive services in their own homes. The three experts reached agreement in *less than half the cases.*[8] Phillips, *et al., Factors Associated With Placement Decisions in Child Welfare*, (Child Welfare League of America, 1971).

Courts similarly have difficulty in making placement decisions:

> Most judges rely heavily on social work personnel in making decisions. Unfortunately, while some courts are blessed with a group of highly trained, dedicated workers, most staffs are filled with young, inexperienced workers who have received little in the way of college or in-service

[8] This disparity occurred despite the fact that their decisions were based upon over 150 separate items of information relating to the need for assistance, including economic and social conditions of the family, behavorial characteristics of all family members and the adequacy of existent parental care.

> training to prepare them to make such decisions. Staff turnover is very high. Caseloads are so high that individual attention cannot be given every case. Thus, in our current system those making the decisions often do not have the background, time or resources necessary to make good clinical predictions.

Wald, (1976) at 640.[9]

Thus, the propensity for error, for children to be improperly removed, is great in this context. Unlike the decisions to be made in *Mathews v. Eldridge*, 424 U.S. at 343, those here are neither "sharply focused" nor "easily documented." Instead the propensity for error is quite high. The few studies of the subject reflect this. For example, in Davidson County (Nashville), Tennessee, 632 children were named in neglect and dependency petitions in 1969. M. Burt & L. Blair, *Options for Improving The Care of Neglected and Dependent Children* 35 (1971):

> Fifty percent (317 out of 632) of all petitioned children were returned home or to relatives without any further supervision by the court or the welfare department. An additional 23 percent (66 intensive supervision cases and 79 continued cases) were returned home under the supervision of the Department of Public Welfare. The remaining 27 percent of the children were placed in Department of Public Welfare foster homes, voluntary organizations (generally institutional settings), or Richland Village (state institution) (usually pending placement at a foster home or voluntary institution).

[9] This Court has recognized that:

> Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child.
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> *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 834.

Similarly, in San Diego, California, "50% of the 2,140 children removed from their homes [between October 1976 and March 1977 were] placed in Hillcrest [dependent shelter] and they returned home again in less than 5 days." B. Barrett, *Child Abuse Public Hearings* 3 (1978). A prompt hearing is required to insure that improperly removed children are returned home, and to insure that the period of separation is kept to the minimum.

3. Government's Interest

In discussing the government's interest, we must again point out the limited scope of the question presented. See pp. 5-6, *supra*. A removal hearing is required by statute. TEX. FAM. CODE ANN. § 17.02. The only question is its timing. Thus, the fiscal considerations of *Mathews v. Eldridge*, 424 U.S. at 347, in which it was determined that increased process would result in "an increased number of hearings," do not come into play. Indeed, should the parents prevail the state will save money, because the prompt return of children to their parents will save the state the cost of subsidizing shelter, institutional, or emergency foster care for those children unnecessarily seized from their parents.[10]

The State urges that to hold prompt hearings would result in the "return [of] such children to conditions threatening their health and physical safety." A.B. at 41. However, they fail to explain why this is so. They seem to be assuming that all removals are warranted and/or that prompt "*ex parte*" hearings have a greater likelihood of returning children to their homes.

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[10] Such care can be extremely costly. For example, in 1971, the Nation spent $117,144,000 on juvenile "temporary care facilities" (detention centers, shelters, reception or diagnostic centers) with per capita operating expenditures of $7,688 per child. LEAA CHILDREN IN CUSTODY: A REPORT ON THE JUVENILE DETENTION AND CORRECTIONAL FACILITY CENSUS OF 1971, Table 16 at p.19.

How delaying the hearings will result in more accurate determinations mystifies *amici*. Hearings must be held. The question is how long the state can delay before holding them. If it is determined at the hearing that the return of the children to their homes would threaten their physical safety, the court will not return them to their homes, but will simply uphold the propriety of the summary removal pending the full adversarial hearing.

4. Balancing the Interests

To recapitulate, we have shown that summary removals result in enormous harm to family integrity, that the risk of state error is great in this context and that the governmental interests in further delay are very questionable. The question of when it is "practicable," *Goss v. Lopez*, 419 U.S. at 582-83, to hold post-removal hearings shall now be considered.

The court below suggests that, "barring unusual circumstances," the *ex parte* hearing should be held on the day of the seizure. 438 F.Supp. at 1193. Appellees suggest that a twenty-four hour standard was required by the three-judge panel and is constitutionally mandated. Motion to Affirm at 35. Some commentators agree with a twenty-four hour standard. *See, e.g.*, Wald, (1976) at 630, n. 26.[11]

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[11] *See also*, National Advisory Committee on Criminal Justice Standards and Goals, *Juvenile Justice and Delinquency Prevention*, 396, Standard 12.9 (1976):

> Within 24 hours of the time the child is removed, the agency responsible for filing petitions should either file a petition alleging that the child is endangered or return the child to the home. If a petition is filed, the court should immediately convene a hearing to determine if emergency temporary custody is necessary to protect the child from bodily injury.

And, *Report of The Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice*, 97, Standard 3.157 (U.S. Dept. of Justice, Law Enforcement Assistance Administration (1976): "Unless the juvenile is returned home earlier, a hearing should be held before a family court judge no more than 24 hours after the juvenile has been taken into custody."

An alternative is proposed by the Institute of Judicial Administration—American Bar Association: Juvenile Justice Standards Project. *See* IJA-ABA: Juvenile Justice Standards Project, *Standards Relating to Abuse and Neglect* (Tentative Draft) (Ballinger Publishing Co., 1977). Those "Standards" recommend that "no later than the first business day after taking custody of a child . . . the agency should be required to report such action to the court. . . ." Standard 4.2B. "Immediately upon receipt of a petition . . ., the court should direct notification . . ., appointment of counsel for the child . . ., and referral of the petition for prosecution. . . . On the same business day if at all practicable, and no later than the next business day, the court should convene a hearing to determine whether emergency temporary custody of the child should be continued, . . ." Standard 4.3A.

The Commentary to the *Standards* notes that:

> The guiding principle here is the recognition of the importance of certainty and permanence to the child's psychological well-being. If there is no compelling reason to displace the presumption of parental autonomy, return to the custody of parents or other such caretakers should take place immediately. . . .
>
> The child's capacity to cope with loss and uncertainty is limited by what, in adult terms, seems a distorted sense of time. Delay in achieving a permanent status and resultant uncertainty and distress, therefore, may be of a longer duration in the child's world than in adult perception. *See* J. Goldstein, A. Freud, and A. Solnit, *Beyond the Best Interests of the Child*, 40-45 (1973). The prolonging of temporary custody performs a disservice to the child in that it disrupts and precludes the formation of meaningful, permanent, and stable emotional bonds.

Commentary to Standard 4.3A p. 87.

Thus, the adoption of such a standard would not only protect the integrity of the family by returning children who were erroneously removed from their families pending the full adversarial hearing, but would also lessen the potential for trauma to the erroneously removed child. By treading a middle ground between an inflexible twenty-four hour rule and an overly vague "not the 'very day' " rule (A.B. at 41), *amici* suggest that these Standards most closely approximate what constitutes a "reasonable time" in light of the policies to be effectuated.

II

Independent Counsel Should Be Appointed for Children at the Post-Removal Hearing.

A growing number of courts have recognized that *parents* facing loss of custody of their children or termination of their parental rights are entitled to protection of the due process clause by appointment of independent counsel.[12] These decisions have stressed the significant nature of the parent-child relationship, the gross imbalance of resources between the parent and the state, and the incompetence of laymen-parents to adequately represent themselves at a complex legal proceeding.

The rationale of these decisions, confirming that parents have a due process right to appointment of counsel in proceedings

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[12] *See, e.g., Davis v. Page*, 442 F.Supp. 258 (S.D. Fla. 1977); *Smith v. Edmiston*, 431 F.Supp. 941 (W.D. Tenn. 1977); *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55 (Mich. 1976); *Lemaster v. Oakley*, 203 S.E.2d 140 (W.Va. 1974); *In re Welfare Luscier*, 524 P.2d 906 (Wash. 1974); *In re Adoption of R.I.*, 312 A.2d 601 (Pa. 1973); *Danforth v. State Department of Health & Welfare*, 303 A.2d 794 (Me. 1973); *In the Interest of Friesz*, 208 N.W. 2d 259 (Neb. 1973); *In re Rodriquez*, 110 Cal. Rptr. 56 (Cal. App. 1973); *In re B.*, 285 N.E.2d 288 (N.Y. 1972); *Shappy v. Knight*, 475 S.W.2d 704 (Ark. 1972); *State v. Jamison*, 444 P.2d 15 (Ore. 1968); and *Chambers v. District Court of Dubuque County*, 152 N.W.2d 818 (Iowa 1967).

to limit their parental rights, is equally applicable in assessing the child's due process right to counsel. The child's liberty interest in the parent-child relationship is co-extensive with that of the parent. Moreover, a child is even less competent than the layman-parent to represent his/her interests in a complex legal hearing, creating an even greater imbalance of resources between the child and the government, than between the parent and the government.[13]

The court below held that an attorney must be appointed to represent the interests of a child who is the subject of a suit affecting the parent-child relationship. *Sims*, 438 F.Supp. at 1194. "Appellants contest this ruling only insofar as the Court included in its decision a requirement for representation at the *ex parte* hearing. . . ." A.B. at 42. Appellants argue that the appointment of counsel for the initial emergency hearing "is not necessary to meet the fundamental fairness standard for due process in juvenile proceedings" because the " 'very day' hearing . . . can never settle any right of any party." A.B. at 42-43. They argue that because the purpose of the hearing is merely to determine whether an emergency situation exists:

> the fundamental fairness requirement will be met by appointment of a legal representative for the child for the full adversary hearing which will be held no longer than 10 days from the actual seizure of the child.

A.B. at 43.

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[13] *See generally*, Note, *Child Neglect: Due Process For The Parent*, 70 COLUM. L. REV. 465 (1970); Catz & Kuelbs, *The Requirement of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings Developing Area*, 13 J. OF FAM. LAW 223 (1973);

Comment, *"Dependent-Neglect Proceedings: A Case for Procedural Due Process,"* 90 DUQ. L. REV. 651 (1971); Comment, "The Indigent Parent's Right to Appointed Counsel in Actions to Terminate Parental Rights," 43 U. CIN. L. REV. 635 (1974); Garff, "Handbook for New Juvenile Court Judges," NAT'L. COUNCIL FOR JUV. COURT JUDGES 42.

Yet the court below found to the contrary and extended the requirement of appointment of counsel for the child to the "emergency" proceeding because the *result* of this proceeding "may be the institution of a suit for the termination of the parent-child relationship." 438 F.Supp. at 1195. Thus the emergency hearing is the first step in a process which may settle the rights of the parties and which may in fact determine the future of the child's special relationship with its parents.

The court below emphasized "the separate competing interests necessarily involved in any suit affecting the parent-child relationship" and noted that:

> The interest of the state and the interest of the child differ in such a manner that *they must be assumed to be adverse until there has been a final adjudication on the merits.*

Sims, 438 F.Supp. at 1194 (emphasis added).

It is clear then that although the state has a legitimate interest in intervening in the relationship between the parent and child (*i.e.*, to protect the child), the interest of the state and the child do not coincide to such an extent that the state can speak for the child at this important stage in the proceedings.

This position was stressed in *Stapleton v. Dauphin County Child Care Service*, 324 A. 2d 562, 573 (Pa. Super. Ct. 1974), in which the court rejected the idea that the child care agency was "the repository of the child's best interests" and therefore could waive the child's statutory right to counsel. The court stated:

> The purpose of the hearing will be to determine what is in [the child's] best interests. To confer power to waive counsel whether on the [biological parents, the foster parents], or the child care service, would be to pre-judge the case, since it would amount to a determination that

> the party's interests were in accord with [the child's] best interest.

The court in *Stapleton* also indicated that neither the biological parent nor the state was qualified to determine the child's best interest. In fact only after a full hearing in which the child has independent counsel, may the best interests of the child be determined.

Although there are strong ties between the parent and child, it cannot always be assumed that the parent and child have completely compatible interests. In a number of situations, the conflict of interests between parents and their children have been noted.

The treatment of children as mere appendages of their parents by the government has been consistently rejected by this Court. For example, in *In re Gault*, 387 U.S. 1, 16 (1967), this Court condemned the reliance on the *parens patriae* doctrine to "rationalize the exclusion of juveniles from the constitutional scheme." This Court has recently reiterated its recognition of the constitutional rights of children:

> Constitutional rights do not mature and come into being magically when one attains the state defined age of majority. Minors, as well as adults, are protected by the constitution and possess constitutional rights.

Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976). This Court went on to recognize that the interests of parent and child may conflict, so that parents may not exercise an automatic veto over decisions made by the child.

This possible conflict of interest between parent and child has likewise been recognized by courts faced with deciding what due process protections are constitutionally mandated before a child can be committed to a mental institution. As the court in *Bartley v. Kremens*, 402 F.Supp. 1039, 1047-48 (E.D. Pa. 1975), *rev'd on other grounds*, 431 U.S. 119 (1977), *argued sub. nom., Secretary of Public Welfare v. Institutionalized Juveniles*, 47 L.W. 3257 (10/10/78), stated: "In deciding to institutionalize their children, parents, as well as guardians *ad litem* or persons standing in *loco parentis*, may at times be acting against the interests of their children." *In accord, J.L. v. Parham*, 412 F.Supp. 112, 138 (M.D. Ga. 1976), *probable juris. noted* 431 U.S. 936 (1977); *In re Roger S.*, 569 P.2d 1286, 1291 (Cal. 1977).[14]

Similarly, the interests and wishes of parents and their children may conflict when the custody or placement of a child is at issue. Many commentators have recognized this conflict and suggest that children should be represented independently in custody disputes between parents and in adoption proceedings.[15] In a case in which a custody order was vacated for failure to appoint a representative for the child, the Wisconsin Supreme Court noted that "the interest of the child is distinct and separate from that of other parties to the litigation and . . . in some cases even the interests of siblings may be incompatible with each other and require separate representation." *de Montigny v. de Montigny*, 233 N.W.2d 463, 468 (Wis. 1975).

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[14] In reaching these conclusions, these courts are acknowledging the position frequently articulated by commentators. *See, e.g.*: Comment, *'Voluntary' Admission of Children to Mental Hospital: A Conflict of Interest Between Parent and Child*, 36 MD. L. REV. 153 (1976); Panneton, *Children, Commitment and Consent: A Constitutional Crisis*, 10 FAM. L. Q. 295 (1977).

[15] *See, e.g.*, Wilcox, *A Child's Due Process Right to Counsel in Divorce Proceedings*, 27 HAST. L. J. 917 (1976); Genslen, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L.L. REV. 565 (1976); Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975); Inker & Paretta, *A Child's Right to Counsel in Custody Cases*, 5 FAM. L. Q. 108 (1971); and Podell, *The "Why" Behind Appointing Guardians Ad Litem for Children in Divorce Proceedings*, 57 MARQ. L. REV. 103 (1973).

The commentators agree that the provision of independent representation for the child is critical to an adequate resolution of the significant conflicting interests at issue in abuse and neglect proceedings.[16] The appointment of an attorney to represent the child who is the subject of neglect, abuse or termination proceedings is further supported by model acts[17] and current standards proposed for the improvement of the juvenile justice system.[18]

Accepting that there is no adequate representation of the child's interests at an adjudicatory hearing by either the state or the parent, the same can be said at the initial removal hearing. The child has an interest in obtaining protection from "immediate danger[s] to his health or physical safety." TEX. FAM. CODE ANN. § 17.01. This interest is coupled, however, with an interest in obtaining such care in the child's own home or in an atmosphere as similar thereto as possible. *See, e.g.*, Wald, (1975) at 991-1000. Fulfillment of these dual require-

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[16] J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interest of the Child* (1973); Genslen, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976); Comment, *Courts: Seen and Not Heard: The Child's Need for His Own Lawyer in Child Abuse and Neglect Cases*, 29 OKLA. L. REV. 439 (1976); Comment, *Dependent-Neglect Proceedings: A Case for Procedural Due Process*, 9 DUQ. L. REV. 651 (1971); Grumet, *The Plaintive Plaintiffs: Victims of Battered Child Syndrome*, 4 FAM. L. Q. 296 (1970).

[17] MODEL ACTS FOR FAMILY COURTS §25 (1975); MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT §12 (1978).

[18] INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Counsel for Private Parties*, Standard 2.3(b) (1976); INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Abuse and Neglect*, Standards 5.1E (1977); NAT'L. ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS AND GOALS, *Juvenile Justice and Delinquency Prevention*, Standard 16.5 (1976); and *Report of the Advisory Committee to the Administrator on Standards for the Administration of Juvenile Justice*, Standard 3.132 (U.S. DEPT. OF JUSTICE, LAW ENFORCEMENT ASSISTANCE AD. (1976)).

ments will present particular conflicts with the interests asserted by both state and parents for a variety of reasons endemic to the nature of a prompt hearing. Provision of independent representation of the child in these proceedings will provide the safeguards necessary to increase the likelihood of a correct removal decision.

The state's interest in these actions is primarily one of offering protection for the child. As a result, in some instances children may be removed prematurely or unnecessarily[19] despite the fact that serious trauma often follows such actions.[20]

Since these removals are only undertaken in emergencies, there is rarely an opportunity for a thorough investigation of the possibility of protecting the child by in-home supervision or part-time foster care. As a result, children are normally placed in large shelter care facilities bearing little resemblance to a family setting. The participation of an independent representative for the child will allow the investigation of alternatives less drastic than removal of the child from the home.

When supportive services or protective supervision will not provide the necessary care, alternatives to shelter care may be explored by counsel. In many instances other relatives or neighbors may be able to provide care for the child on a temporary basis thereby minimizing the disruption to the child.[21] Where foster placements are not available within an individual county, it may be possible to secure such care in a neighboring county. Finally, the attorney for the child may be able to exert pressure on the local agency to move the child into foster care as soon

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[19] *See* footnote 7.

[20] *See* the discussion at pp. 10-13.

[21] In the instant case two of the Sims children were eventually placed with their maternal grandparents, but not until twelve days had elapsed from the initial seizure. *See* Appendix, Volume II, pp. 153-155.

as a placement becomes available, prior to the adjudicatory hearing.

Reliance on the parents to assert the rights and interests of the child is as equally misplaced as reliance on the state. In some situations the parents may not be present due to their emergency hospitalization for medical or psychiatric care, or simply because the child has been abandoned. Even in situations when the parents are present, there is no guarantee that they will be represented by legal counsel.[22]

Assuming the presence of parents, and their representation by adequate, competent counsel, difficulties still remain in insuring that the child's interests will be represented. Counsel for the parent may use the initial hearing more as an opportunity to learn the type and quality of evidence to be presented by the state at adjudication than to present an affirmative case on the parents' behalf. This could become particularly true in jurisdictions such as Texas where a full adjudicatory hearing will be held within ten days of the initial removal.

Another possibility cited by some of the commentators stems from the fact that parents may misperceive the role of the social worker investigator in these cases. In attempting to cooperate with the investigator, parents might even go so far as to accede in the removal, either because of a fear that welfare payments will be cut off, or because of a belief that the child will be returned more quickly.[23] The participation of the child at this stage through counsel, then, is the only way to insure that the risk of an erroneous decision is minimized in these emergency hearings.

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[22] The issue of the parent's right to counsel was presented to the three-judge court in the companion case to *Sims, Woods v. Jimenez.* The court declined to rule on that issue, however. *Sims,* 438 F.Supp. at 1195.

[23] Levine, at 13.

Additional benefits, including an increased likelihood of a proper determination at adjudication, will also flow from the early provision of counsel to the child. Although it is generally accepted that early entrance of counsel into any litigation increases the likelihood of competent representation, the situation is particularly critical in cases where a child is a potential witness. Young children are thought generally capable of describing discreet events[24] but may often have trouble ordering events chronologically or accurately judging duration.[25] For these reasons it is thought crucial that the attorney appointed to represent the child interview the client as soon as possible after a removal from the home. Besides preserving the events as they have actually occurred, early contact facilitates a more accurate picture of the child's feelings toward the parents. Children are generally thought to be highly suggestible and susceptible to manipulation by adult authority figures.[26] Given that the temporary care of the child may occur in an atmosphere hostile to the child's parents, interviews with the child after exposure to such environments may be colored significantly by these influences.

Further, the prompt appearance of an attorney for the child into the case may assist in the preservation of physical evidence and witnesses' testimony.[27] Photographs of a child's injuries or medical examination to detect the presence of semen may all be critical in an eventual adjudicatory hearing. Prompt medical

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[24] H. Freeman and H. Weihofen, *Clinical Law Training* 458 (1972).

[25] J. Praget, *The Child's Conception of Time* 10-29, 39-49 (1927); D. Flapan, *Children's Understanding of Social Interaction* 3 (1968).

[26] Freeman and Weihofen, at 460; J. Rich, *Interviewing Children and Adolescents* at 41, 56.

[27] INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Counsel for Private Parties,* Commentary at 98 (1976).

or psychiatric examination of the parent or child may also be important.[28] Potential witness testimony may be lost if not taken at once.

Independent counsel for the child is also essential at the emergency hearing stage to insure that counsel for the parents and the state do not waive the ten day time limit for the full adversary hearing. Although the three-judge court held that the state may not "stack" *ex parte* orders and thereby retain custody of the child for more than ten days "without complete adversary hearing with notice to the parents," *Sims*, 438 F.Supp. at 1193, this does not eliminate the possibility that, after notification, the parties might not agree to postpone the full hearing. The existence of such a possibility underscores the necessity of giving the child a voice with which to protect his/her own interests in speedy resolution of the custody dispute.

Commentators have recognized the gravity of the deprivation suffered in even temporary removals, the inherent conflicts occurring in any subsequent judicial scrutiny of these actions, and the potential positive contribution of independent counsel for the child. These concerns have prompted them to recommend that representation of the child commence at the earliest possible date in abuse and neglect proceedings, participating in any judicial review of the need for detention.[29]

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[28] *Id.* at 98.

[29] MODEL ACTS FOR FAMILY COURTS, 27 §23 (1975): "(c) At the commencement of the detention or shelter care hearing, the judge shall advise the parties of the right to counsel and shall appoint counsel as required by Section 25."; INST. OF JUDICIAL AD./A.B.A., *Standards Relating to Abuse and Neglect*, 86, Standard 4.3 (1977):

> Court review regarding children in emergency temporary custody. A. Immediately upon receipt of a petition submitted pursuant to Standard 4.2 [an agency taking emergency temporary custody of a child], the court should direct notification pursuant to Standard 5.1D., appointment of counsel for the child pursuant to Standard 5.1E., and referral of the petition for prosecution pursuant to Standard 5.1F. . . .

NAT'L. ADVISORY COMMITTEE ON CRIM. JUST. STANDARDS AND GOALS, *Juvenile Justice and Delinquency Prevention*, 565 Standard 16.7 (1976):

> [L]egal representation should be made available at the earliest feasible stage of family court proceedings. Each State at least should adopt procedures whereby counsel can be appointed:
>
> 1. At the intake stage where the juvenile is not detained; and
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> 2. At the judicial detention hearing stage where the child has been removed from the home.

The state's final argument against the appointment of counsel for the child at the emergency hearing stage is the " 'undue burden' such a requirement creates." A.B. at 43. They assert that the "practical implications would be overwhelming . . . particularly when weighed against the short-term impact of the *ex parte* emergency hearing." A.B. at 43. Given that counsel must in any case be appointed for the full adversary hearing, it is difficult to understand how a slightly earlier appointment would create additional burdens. Furthermore, that the impact of the *ex parte* hearing may be much more than "short-term" was precisely the reason that the three-judge court extended this requirement to this important stage of the proceedings.

III

A Finding Based on the Standard of Clear and Convincing Evidence Should Be Required in All Proceedings Affecting the Parent-Child Relationship.

The three-judge court held that the standard of proof in suits affecting the parent-child relationship should be "clear and convincing evidence." It reasoned:

> Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding

> requiring proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 90 S.Ct. 358, 25 L.Ed.2d 368 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County Iowa, supra.*

Sims, 438 F.Supp. at 1194.[30]

This decision comports well with the reasoning of this Court. As Mr. Justice Harlan explained, concurring in *In re Winship*, 397 U.S. 358, 370-71 (1970) (emphasis in original):

> First, in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a fact finder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.
>
> A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways.
>
> First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. . . . On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. . . .
>
> The standard of proof influences the relative frequency of these two types of erroneous outcomes. . . . Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.

Although the holding in *Winship* concerned delinquency cases, Justice Harlan's analysis and reasoning is nevertheless applicable to determining the appropriate standard of proof in the dependency cases under consideration here.

The inquiry is, therefore, what standard of proof in suits affecting the parent-child relationship will create the least "social disutility."

It has been established that children and parents have a liberty interest in remaining together without state interference. *See* pp. 6-9, *supra*. "Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test." *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). When we are concerned with family integrity, rights deemed by this Court "far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), the need for a "real test," *(Fuentes)* becomes even more acute. For:

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[30] *See also Singleman, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1087 (1975), "most model acts adopt the middle ground standard of clear and convincing proof," *citing*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, rule 26 (1969); UNIFORM JUVENILE COURT ACT Sec. 29(c).

> This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone. *Cf. Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). Surely, in the case before us, if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

Stanley v. Illinois, 405 U.S. at 647.

Furthermore, a higher standard of proof is required in a suit affecting the parent-child relationship precisely because once parents are deprived of their children, that deprivation may not easily be undone. Once a state sustains its burden in the initial suit affecting the parent-child relationship, many states shift the burden to the parents at the dependency renewal hearing to show cause why the jurisdiction of the court over the minor should be terminated:

> [T]he burden of proof . . . [was] not satisfied by a mere showing that the minor has a parent capable of exercising effective parental care and control over him. While [this] . . . was necessary at the original hearing . . . continued jurisdiction over the minor is not dependent solely on whether a parent is capable of exercising proper and effective parental control over him but on whether the best interest of the child is served by freeing him from further supervision. . . .

In re Francecisco, 94 Cal. Rptr. 186, 180 (1971). Thus, because the probability of return of the child to his/her parents after the initial determination at the suit affecting the parent-child relationship is diminished, a factfinder should be required to have a higher degree of confidence in his or her factual conclusions than a mere "preponderance of the evidence."

Returning to Justice Harlan's analysis in *In re Winship*, 397 U.S. at 371-372:

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems peculiarly appropriate for, as explained most sensibly, it simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.' In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. As Mr. Justice Brennan wrote for the Court in *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958):
>
> > There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Unlike the civil suit for damages, the instant case concerns interests of "transcending" value since the final outcome of a suit affecting the parent-child relationship may be termination of that relationship. TEX. FAM. CODE ANN. § 11.01(5). Similarly, the loss of liberty upon civil commitment to a mental institution has been found to be an interest of transcending value such as to require proof beyond a reasonable doubt. *See, e.g., In re Ballay*, 482 F.2d 648 (D.C.Cir. 1973); *accord, Suzuki v. Quisenberry*, 411 F.Supp. 1113, 1132 (D. Hawaii 1976); *Lessard v. Schmidt*, 349 F.Supp. 1078, 1095 (E.D.

Wis. 1972). A judicial decision to remove a child from his or her parents following a suit affecting the parent-child relationship may result in a loss of liberty similar to that of one who is civilly committed because the child may be placed in an institution if placement with relatives or in foster homes is not available. For these reasons, something more than a preponderance of the evidence should be required.[31]

The preponderance test, at best, only requires the decision-maker to determine "what he believes most probably happened." *In re Winship*, 397 U.S. at 371, n.3. To allow families to be disrupted or destroyed on the basis of what "probably happened" does not comport with either the primacy this Court has determined family life to be deserving of or with the potentially severe emotional impact removal from the home may have on the very child whose "best interests" are at issue.

Appellant's justifications for a preponderance standard are unpersuasive. They urge that since the area of child neglect is "not readily quantifiable" a preponderance standard is adequate. A.B. at 44. However, the subjectivity of the determination argues for a higher standard of proof. By definition, to relax the standard to a mere showing of "preponderance" is to maximize, and not, as is required, "to minimize substantively unfair or mistaken deprivations. . . ." *Fuentes*, 407 U.S. at 81.

The State's further justifications are unenlightening. The higher standard of proof required by due process does not impose any cost whatsoever on the State. It is no more time-

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[31] A clear and convincing standard "is no stranger to the civil law", *Woodby v. Immigration Service*, 385 U.S. 276, 285 (1966); and has been applied ". . . in situations where the various interests of society are pitted against restrictions on the liberty of the individual . . ." *In re Ballay*, 482 F.2d at 662. *Woodby v. Immigration Service*, deportation; *Chaunt v. United States*, 364 U.S. 350 (1960), denaturalization.

consuming or difficult to apply one standard than the other.[32] As noted previously, error and mistaken seizures pervade this area.

Amici desire to protect the innocent abused child, as well as the innocent non-abusing family. To require clear and convincing proof before children are taken away strikes a fair balance between these concerns.

IV

The Younger v. Harris Doctrine of Equitable Restraint Should Not Be Applied in This Case.

The establishment of federal question jurisdiction, the decision in *Ex Parte Young*, 209 U.S. 123 (1908), permitting federal courts to grant injunctive relief against the threatened enforcement of unconstitutional state laws, and the enactment of the Civil Rights Act of 1871 and its jurisdictional counterparts, "established the modern framework for federal protection of constitutional rights from state interference." *Perez v. Ledesma*, 401 U.S. 82, 107 (1971). Indeed, federal courts have become the "*primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original).

The federal courts are not, however, unrestricted in exercising jurisdiction in certain types of cases. In *Younger v. Harris*,

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[32] Civil Courts are familiar with this standard. As this Court has noted:

> This standard, or an even higher one, has traditionally been imposed in cases involving allegations of civil fraud, and in a variety of other kinds of civil cases involving such issues as adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, and the like. See 9 Wigmore, Evidence Sec. 2498 (3d ed. 1940).

Woodby v. Immigration Service, 385 U.S. at 285, n. 18.

401 U.S. 37 (1971), this Court held that in the absence of extraordinary circumstances, a federal court is precluded from enjoining a pending state criminal prosecution. The purpose of the rule was spelled out by the Court:

> To prevent erosion of the role of the jury and [to] avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted.
>
> [T]he notion of "comity" . . ., the belief that the National Government will fare best if the States and their constitutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44.

The policy of equitable restraint expressed in *Younger v. Harris*, 401 U.S. 37 (1971), is premised on the notion that an accused party is generally afforded an opportunity to vindicate his constitutional claims in the pending state court proceedings. Ordinarily a pending state prosecution provides the accused with a fair and sufficient opportunity to vindicate all constitutional rights. *See Kugler v. Helfant*, 421 U.S. 117, 124 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460 (1974); *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052, 1062 (6th Cir. 1977). Thus, the Court continued in *Younger*, 401 U.S. at 43: "Courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

If state remedies are inadequate and irreparable injury is threatened, federal courts may still act. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that *Younger* abstention was not warranted in a case which sought injunctive relief against pre-trial detention without a judicial determination of probable cause. This Court determined that the issue of the

legality of the pre-trial detention could not be raised as a defense to the criminal prosecution and that since the injunctive relief granted (an order to hold preliminary hearings) could not prejudice the trial on the merits, injunctive relief was appropriate. 420 U.S. at 108, n.9. The *Gerstein* holding has most recently been re-affirmed in *Judice v. Vail*, 430 U.S. 327 (1977).

Amici submit that *Gerstein* is dispositive of the case *sub judice*. The constitutional challenge in *Gerstein* in no way threatened the state's ability to prosecute the defendants; no constitutional challenge to their prosecution was made. Only the constitutionality of holding defendants without a judicial hearing was raised. Here appellees are in an identical situation; they do not challenge the state's right to pursue its "suit affecting the parent-child relationship." Rather, as in *Gerstein*, the only constitutional challenges of concern are those which urge that seized children may not be held without a prompt post-removal hearing and that counsel be appointed to represent the children at that hearing. As in *Gerstein* the state was merely enjoined from holding children in the absence of this preliminary hearing. Indeed, the hearing prayed for in *Gerstein* to determine the legality of pre-trial detention is directly analogous to the hearing appellees seek herein to determine the legality of the seized children's detention pending an adversary hearing. Here, appellees' suit is in no way "designed to annul the results of a state trial," since the relief sought can be said to be "wholly prospective": to preclude further summary seizures of appellees' children pursuant to a state law and practice alleged to violate appellees' constitutional rights. *Wooley v. Maynard*, 430 U.S. 705, 711 (1977).

Further, there is no opportunity during the course of the hearing on the merits either in a criminal case *(Gerstein)* or in a suit affecting the parent-child relationship to raise the issue of the legality of the pre-adjudicatory activities as a defense to the charge. The defense to the charge that a person in fact has com-

mitted a crime or has abused or neglected a child is in no way affected by activities such as the denial of a probable cause determination or the summary seizure and detention of a child. These issues will not be raised in the on-going state proceeding and the parties will not be afforded an opportunity to vindicate their rights in the state proceedings.[33]

These same principles have been followed in a case involving the juvenile court system.[34] In *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973), cited with approval in *Gerstein*, 420 U.S. at 108, n.9, a class consisting of juveniles who had been or were likely to be subjected to the intake procedures under the Pennsylvania Juvenile Code, argued that the intake procedures were so vague and standardless as to deprive them of due process. The Third Circuit reversed the lower court's opinion and held that the principles of *Younger* did not require abstention since the juveniles who had been processed through the system had no opportunity to raise their claims prior to adjudication and no Pennsylvania procedure exists which would permit them to vindicate their claims. 477 F.2d at 1081. Moreover, the challenge to the intake procedure did not involve issues raised at an adjudicatory hearing, nor did the challenge in any way interfere with subsequent prosecution of these juveniles by the State. The court stated: "Since a remedy with respect to the

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[33] In *Trainor v. Hernandez*, 431 U.S. 434 (1977), the Court remanded for a determination as to "whether appellees could have presented their federal due process challenge . . . in the pending state proceeding." 431 U.S. at 447. The impossibility of raising the due process issues herein in the pending state proceeding shall be elaborated upon *infra*.

[34] *See also, Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974); *Santiago v. Philadelphia*, 435 F. Supp. 1136 (E.D. Pa. 1977); *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976), holding that federal court challenges to the pre-adjudicatory stage in juvenile cases were not subject to the *Younger* abstention rule. *Cf. Ealy v. Littlejohn*, 569 F.2d 219 (5th Cir. 1978), in which the court held that because there was no formal ongoing criminal proceeding nor any available state civil proceeding in which plaintiffs could vindicate their constitutional rights, *Younger* equitable restraint is inappropriate.

intake procedures would not necessarily interfere with the adjudication function of the Commonwealth's juvenile court, it is therefore not necessarily precluded by *Younger v. Harris, supra*, or *Samuels v. Mackell, supra*." 477 F.2d at 1082.

Appellees in this case find themselves in a situation similar to that of the plaintiffs in *Conover v. Montemuro*. They challenge the pre-hearing procedures in abuse and neglect cases; a decision concerning the constitutionality of procedures at the pre-adjudicatory stage will not preclude the state from proceeding with the charges. In fact, a petition has been pending since May 1976 in the Montgomery County juvenile court, yet the State has not proceeded on this charge even though it may do so.

The judgment of the district court imposes no impediment to proceeding to a hearing on the merits of the claim; the State could seek temporary custody pending the hearing subject only to the requirement that notice and a prompt post-removal hearing be provided. Indeed, the State can still summarily seize the Sims' children if there is an immediate danger to their health or physical safety. The district court's judgment only requires that the State be prepared to defend the necessity for the summary seizure and any request for temporary custody at a hearing to be held at the earliest reasonable time.

Similarly, the Sixth Circuit found the rule in *Younger* inapplicable in a case in which injunctive relief was sought from a federal court to permit out-of-state attorneys to represent a client in a state criminal proceeding. *Flynt v. Leis*, 574 F.2d 874 (6th Cir. 1978), *cert. granted*, — U.S. —, 46 U.S.L.W. 3723 (May 12, 1978). In that case, the court held there was no method by which the state proceedings then pending could provide a forum for the adjudication of the attorneys' rights:

> While the relief sought by the Plaintiffs necessarily entails a delay in the state court criminal prosecution, the grant of relief will not permanently prevent prosecution. Follow-

> ing the hearing, the State prosecution may go forward on the merits. The grant of relief will not prevent the State from interpreting and enforcing its own criminal laws.

574 F.2d at 881. *Accord, Bundy v. Rudd,* 581 F.2d 1126, 1130 (5th Cir. 1978).[35]

As we have shown, abstention is improper when the issue cannot be raised in the on-going state procedure or the inadequacy of the state court remedy renders imperative the availability of a federal forum. *See also, Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975). Both *Huffman* and *Juidice v. Vail,* involved situations in which in addition to the opportunity to present their claims in the state trial court, there was a clearly defined remedy of state statutory appeal through which plaintiffs might have vindicated their federal constitutional claims. In *Huffman,* plaintiff on advice of counsel *deliberately sought to forego* raising his federal claim as a defense in the state court proceeding, choosing instead to file in the district court, therein seeking relief which would annul the result of the prior state proceeding. *Huffman,* 420 U.S. at 609-610. In *Juidice* the plaintiff again clearly had state statutory appeal available as a remedy. The plaintiff in *Juidice,* however, for a period of more than nine months ignored every stage of the state court proceeding in which he had been a defendant and instead decided to become a plaintiff in an action brought in the district court. *Juidice,* 430 U.S. at 330.

Similarly, in *Trainor v. Hernandez,* plaintiffs failed to file an answer, did not attempt to obtain a hearing or to quash the attachment. Rather, they immediately filed suit in federal district court. After reviewing these factors, this Court held

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[35] *See Doe v. Maher,* 414 F.Supp. 1368 (D.C. Conn. 1976), *vacated on other grounds,* 432 U.S. 526 (1977), in which the court found that the inability of plaintiff to raise her constitutional claims in defense of the state proceeding warranted the entry of injunctive relief against the state court proceeding.

that the district court had not addressed the issue of whether an adequate state forum exists in which the federal constitutional claim could have been raised. 434 U.S. at 447.

A very different situation exists in the instant case. After reviewing the procedural steps taken by Mr. and Mrs. Sims, the district court stated: "Unlike the plaintiff in *Juidice,* the *Sims* plaintiffs have not failed to avail themselves of *any* opportunities in the state procedures." 438 F.Supp. at 1188 (emphasis added). Thus, the court held: "We find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply." 438 F.Supp. at 1188.

Yet appellants allege that appellees could have pursued their claims in a state forum; this is clearly erroneous. J.S. at 18. On March 26, 1976, one day after the children were seized, the Texas Child Welfare Unit instituted a suit for the protection of the child in an emergency, TEX FAM. CODE ANN. Chap. 17, in Harris County, Texas. On that very day (March 26), the judge issued an *ex parte* order pursuant to TEX. FAM. CODE ANN. § 17.04, sanctioning the emergency removal. On March 31, 1976, the parents presented a Motion to Modify the *ex parte* order as authorized by TEX. FAM. CODE ANN. § 17.06. This Motion was not accepted due to the absence of one judge and the reluctance of another to rule on the motion. Therefore, the motion was never set for hearing or ruled on by the court.[36]

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[36] Although appellees are clearly not required, under *Younger* principles, to exhaust extraordinary state remedies prior to seeking federal relief, they nonetheless petitioned for a Writ of Habeas Corpus in the Juvenile Court of Harris County on March 31, 1976. *See, Steffel v. Thompson,* 415 U.S. 452, 472-3 (1974); *Monroe v. Pape,* 365 U.S. 167, 183 (1961). The court should have ruled on the petition by April 5, 1976, but for an unknown reason, the court declined to act. The failure of that court to rule on the petition could conceivably be attacked only by way of mandamus. Again, this would

When the Juvenile Court of Harris County refused to set appellees' Motion to Modify the Chapter 17 *ex parte* order issued by the court on March 26, 1976, the court denied appellees their sole opportunity to question the constitutionality of that Chapter. No interlocutory appeal could have been taken from the *ex parte* order entered under Chapter 17. Moreover, even if it were authorized, an appeal could not have been effectuated within the time available to appellees. Under Texas law it is well established that a temporary restraining order is interlocutory in nature and not an appealable order. *Heidelberg v. Harvey,* 368 S.W.2d 947 (Tex. 1963); *Texas State Federation* of *Labor v. Brown & Root,* 223 S.W.2d 622 (Tex. Civ. App. 1950).

An emergency order issued under Chapter 17 is clearly in the nature of a temporary restraining order. It is issued *ex parte* to maintain the status quo once a child has been seized by the Texas Department of Human Resources and will expire at the end of ten days or earlier upon the filing of a "suit affecting the parent-child relationship." TEX. FAM. CODE ANN. § 17.05.

On April 5, 1976, the parties appeared before Judge Lowry of the Harris County Juvenile Court. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. Although a Petition for Writ of Habeas Corpus was pending and the Motion to Modify could have been set, Judge Lowry did not address the merits of the case, but rather merely transferred the case to Montgomery County, the county of the family's residence. Thus the substantive issues of

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require the filing of an independent lawsuit invoking the original jurisdiction of the Texas Supreme Court. TEX. CONST. art. V, 3; TEX. REV. CIV. STAT. ANN. art. 1733 (1962). A separate mandamus action, however, would be available only for a limited purpose: to require the juvenile court to *rule* on the Petition for Habeas Corpus.

the parents' claim were not addressed and the children were continued in the custody of the court.

Not content with this action, the Child Welfare Unit filed a second suit pursuant to TEX. FAM. CODE ANN. § 11.11 in Harris County Juvenile Court on April 5, 1976. On that very day, the same day on which the prior suit had been transferred by this same judge, Judge Lowry issued another *ex parte* order. This order continued custody of the children with the Child Welfare Unit. Once again notice of the hearing was not given to the parents. Subsequently, on April 6, 1976, all matters were officially transferred to Montgomery County. At this point, there were two *ex parte* orders issued pursuant to TEX. FAM. CODE ANN. Chap. 17 and Chap. 11, which ostensibly were in effect. No appeal could be taken from these orders, however.

The Houston Court of Civil Appeals, the court to which an appeal of a juvenile court order must be taken from Montgomery and Harris Counties, has consistently ruled that no interlocutory appeal is permitted under the Texas Family Code. The most recent reported decision of that court concerning this issue is *Knipe v. Colpitts,* 551 S.W.2d 150 (Tex. Civ. App. 1977), in which a parent sought to appeal from an order establishing temporary child visitation. The court noted that this was an order only affecting the rights of the parties pending trial on the merits, and held that "orders of a nature affecting visitation and conservatorship are interlocutory only and not appealable." 551 S.W.2d at 151. *See also, Johnson v. Parish,* 547 S.W.2d 311 (Tex. Civ. App. 1977), holding that there is no right of appeal from an order entered under TEX. FAM. CODE ANN. § 11.11; *Carpenter v. Ross,* 534 S.W.2d 447 (Tex. Civ. App. 1976). As stated above, an order entered under Chapter 17 is also interlocutory and cannot be appealed.

There was simply no remedy available by which appellees could have raised their constitutional claims in the pending

state proceeding.[37] The issues arising out of the Chapter 11 and Chapter 17 *ex parte* orders, the issue of appointment of counsel, and the Chapter 34 CANRIS questions could only have been raised by the initiation of separate lawsuits in the state courts. Moreover, had even that extraordinary course of action been adopted, there is no certainty that appellees could have obtained a hearing on the merits of their claims.

Appellees were denied the opportunity to raise their constitutional questions as to Chapter 17 by the refusal of the juvenile court of Harris County to hear their Motion to Modify the Emergency Orders, and thus could not preserve this question for appeal. Similarly, appellees could not have raised the constitutionality of the stacking of the *ex parte* emergency order issued under Chapter 17 on March 26, 1976, and the *ex parte* temporary restraining order issued under Chapter 11 on April 5, 1976, since these interlocutory orders would have expired upon the rendition of a final judgment and would have been considered moot issues by the Texas courts.

Texas courts decline to rule on the constitutionality of statutes whenever such a ruling can be avoided and in those cases in which the constitutional issue does not reach the merits of the case. *San Antonio General Drivers, Helpers Local No. 657 v. Thornton*, 299 S.W.2d 911 (Tex. 1957); *Texas Department of Public Safety v. Perlman*, 340 S.W.2d 522 (Tex. Civ. App. 1960). Thus, the constitutionality of a temporary order will not be reviewed by an appellate court following the entry of a final judgment, since under Texas law that issue is moot because the order has expired. *Coleman v. Texas State Department of Public Welfare*, 562 S.W.2d 554 (Tex. Civ. App. 1978); *In the Matter of R.E.W.*, 545 S.W.2d 573 (Tex. Civ. App.

[37] On May 4, 1976, the parents filed a motion for leave to file an original Petition for Writ of Habeas Corpus in the Texas Court of Civil Appeals. The motion was denied on the same date for want of jurisdiction, thereby foreclosing the possibility of seeking any appellate redress at this stage.

1976); *Conway v. Irick*, 429 S.W.2d 648 (Tex. Civ. App. 1968).

In *Coleman*, a mother whose child was taken from her at a hearing in which she was not represented by counsel, whose child was kept from her custody for a period of fifteen months by temporary orders, who had asserted federal due process violations by motion in the trial court, and whose parental rights had been terminated after a trial on the merits sought to raise the due process violations on appeal. The Texas Court of Appeals refused to consider these issues holding: "Any error which may have been committed in issuing the temporary order is perforce of the final judgment immaterial, and renders that issue in the appellate court moot." 562 S.W.2d at 556.

Unlike this case, in *Juidice v. Vail* it was "abundantly clear that appellees had an *opportunity* to present their federal claims in the state proceedings," either at the hearing on the order to show cause or on a post hearing motion to stay or vacate the contempt fine and commitment. 430 U.S. at 337. In *Trainor v. Hernandez*, appellees neither answered the attachment pleadings nor sought to quash or be heard on the constitutional questions surrounding the attachment's issuance. Whether the state remedies available to the *Trainor* appellees were in fact viable was left unresolved by this Court. 434 U.S. at 447, n. 10. It was clear, however, that, as in *Juidice*, the *Trainor* appellees completely failed to pursue their constitutional claims in the pending state proceeding. Hence, they were correctly barred by *Younger* principles which preclude the State's being confronted with a "choice of engaging in duplicative litigation. . . ." *Trainor v. Hernandez*, 434 U.S. at 445.

Appellees in the instant case concede that they "need be accorded only an *opportunity* to fairly pursue their constitutional claims in the *ongoing state proceedings*. . . ." *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (emphasis added). The fore-

going amply demonstrates that appellees have been accorded no such opportunity. Indeed, their persistent and extraordinary attempts to avail themselves of all avenues of redress were consistently thwarted by the appellants. Therefore, the federal district court was correct in refusing to apply the doctrine of equitable restraint enunciated in *Younger v. Harris*, to this case.

CONCLUSION

For the above-stated reasons, the decision below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants

v.

JOHN PLEASANT SIMS, et al.,
Appellees

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

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OCTOBER TERM, 1978

No. 78-6

HILMAR G. MOORE, et al.,
Appellants

v.

JOHN PLEASANT SIMS, et al.,
Appellees

On Appeal From The United States District Court For The Southern District Of Texas, Houston Division

---

BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

QUESTIONS PRESENTED ON APPEAL

I.

Whether Equitable Restraint and Comity Required Abstention?

II.

Whether a Case or Controversy Existed?

III.

Whether the Challenged Portions of the Child Abuse Statutes are Unconstitutional?

INTEREST OF THE AMICUS

East Texas Legal Services, Inc., is a federally funded non-profit corporation that provides legal representation to low income people residing in fifteen counties in rural Deep East Texas. Attorneys for East Texas Legal Services currently represent, and have represented, many people affected by the Texas statutory scheme for addressing the problem of child abuse declared Constitutionally deficient by the District Court below. Our clients include parents faced with the involuntary modification and termination of their parental rights and children whom we represent as *ad litems* in suits affecting the parent-child relationship.

East Texas Legal Services began seeing clients in February of 1978, and consequently our clients have been able to avail themselves of the protections provided by the District Court in *Sims v. State Department of Public Welfare,* 438 F.Supp. 1179 (S.D. Tex. 1977). We have found that the state courts in the vast rural geographic areas our attorneys cover have been able to effectively administer Texas law in the field of child abuse consistent with the *Sims* constitutional protections for both parents and children.

Our experience has demonstrated that Texas' policy for protecting its minor citizens has not been frustrated by the District Court's insistence that the State adhere to constitutionally permissible procedures. East Texas Legal Services feels that this Court should be apprised of the fact that the State has been able to implement its policy in rural East Texas despite its claim that the rural nature of much of Texas renders implementation of several of the District Court's mandates impracticable. The State's claim unduly denigrates the rural Texas bench and bar.

The District Court's requirements have proven no more difficult to satisfy by the State Courts in East Texas than have constitutional requirements set by this Court in the areas of criminal, juvenile, and prejudgment seizure law. Judges are available in rural East Texas to issue emergency orders and to hold hearings, and attorneys are available to act as *ad litems*. We feel certain that the legal services programs covering other rural areas of this state including West Texas Legal Services, Texas Rural Legal Services, Central Texas Legal Services, and Gulf Coast Legal Services share our experience.

East Texas Legal Services, Inc., submits this brief because it strongly believes that the Texas statutory scheme successfully challenged by appellees was fraught with procedural and substantive defects of constitutional magnitude, and that the District Court's granting of equitable relief has substantially remedied these defects. The resultant effectuation of the state's sound policy in protecting children from abuse and neglect has shown the District Court's sensitive approach to the interests of both the state and its citizens to be consistent with the highest standards of the United States' system of federalism. For these reasons, East Texas Legal Services, Inc., respectfully submits this Brief *Amicus Curiae*.

STATEMENT OF THE CASE

The civil action was brought by the appellees, two parents and their three minor children, for relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare (hereinafter referred to as "The Department") in the United States District Court for the Southern District of Texas, Houston

Division. The action challenged the constitutionality, both facially and as applied, of Chapters 11, 14, 15, 17, and 34, Title 2 of the Texas Family Code, and it sought declaratory, monetary, and injunctive relief against the Department's past and prospective interference with Appellees' family under authority of the challenged statutes. Pursuant to 28 U.S.C. §§ 2281 and 2284 a three-judge court was convened to consider the constitutional claims.

The Appellees filed their action in the District Court on April 19, 1976, after the Department had taken and kept custody of the family's three children for twenty-four days on the strength of two ex parte orders issued by the Harris County and Montgomery County juvenile courts. The District Court's initial action occurred on May 5, 1976, when it issued a preliminary injunction mandating the return of the three children. At that time, the children had been held by the Department for forty-two days; the Appellees had been frustrated in their attempt to modify the initial ex parte order authorizing seizure of the children (their motion was returned, unfiled); they had made two fruitless attempts at state habeas corpus; and they had not been served with any process on any suit initiated by the Department.

On May 21, 1976, the District Court, after hearing, entered a Temporary Restraining Order prohibiting any further state proceedings in Montgomery County, where the Department had filed a second suit affecting parent-child relations and had sought possession of one of the minor children by writ of attachment. When the three-judge court issued a preliminary injunction on June 7, 1976, there were two suits pending in state court in Montgomery County; state courts had issued three ex parte orders, and the Appellees had yet not had a hearing

in state court on anything other than the habeas corpus actions they initiated.

The State has taken this appeal from the District Court's decision that certain provisions of Title 2, Texas Family Code, were unconstitutional on their face as violative of due process and that several other provisions were unconstitutional as applied. The State bases its appeal to this Court on the grounds of abstention, justiciability and a lack of a case or controversy, and that the District Court's decision erred on the merits of Appellees due process. (Jurisdictional Statement pp. 10-11).

It is the position of the *Amicus* that the District Court acted properly under the doctrine of *Younger v. Harris*, 401 U.S. 705 (1971) in determining not to abstain from hearing Appellee family's constitutional claims and that those claims were properly adjudicated by the District Court.

I.

THE DOCTRINES OF EQUITABLE RESTRAINT AND COMITY DID NOT REQUIRE THE DISTRICT COURT TO ABSTAIN.

A. Neither Equitable Restraint Nor Comity Requires Abstention Where Great And Immediate Irreparable Injury Coincide With Bad Faith And Unavailability Of State Forum Redress Of Substantial Federal Constitutional Rights.

The Appellants' abstention argument contrives to square the facts of this case with several bald assertions about the availability of an effective state proceeding where the family could have raised its multiple constitutional

claims in order to show that the District Court failed to heed this Court's directions in *Younger v. Harris,* 401 U.S. 37 (1971); *Judice v. Vail,* 430 U.S. 327 (1977); and *Trainor v. Hernandez,* 431 U.S. 434 (1977). In order to avail itself of the doctrines of equitable restraint and comity, the Appellants argue (1) that the family's constitutional rights could have been resolved in one state proceeding (Jurisdictional Statement, p. 13); (2) that there were available State procedures for raising any constitutional claims (Jurisdictional Statement, p. 18); and (3) that there were no "extraordinary circumstances" sufficient to except this case from *Younger v. Harris, supra* and its progeny. (Jurisdictional Statement, pp. 15-16). Even a cursory analysis of the facts of this case show the State's argument as the contrivance it is.

The first tack of the Appellants' argument on abstention suggests that any and all constitutional claims could have been reserved to the time of trial, where they might be raised defensively. (Jurisdictional Statement, p. 18) Appellees may well have desired to try this avenue, but the fact remains that no state court hearing, even on temporary ex parte orders, was *scheduled* until May 21, 1976. (Jurisdictional Statement, p. 9) Assuming that a trial on the merits would have been possible, an adverse ruling on the parent-child status renders constitutional claims involving the seizure and detention of the children moot as a matter of state law. *In the Matter of R.__E.__W.__,* 545 S.W.2d 573, 575 (Tex. Civ. App. —Houston 1976, writ ref. n.r.e.).

In addition, Appellants acknowledge that the Appellee family was involved in two separate lawsuits involving children of the family, but maintain that this untoward development could have been resolved by res judicata

(Jurisdictional Statment, p. 13), thus facilitating the single proceeding resolution. However, the state-initiated lawsuits in Montgomery County were distinct in that the first involved all three children and the second involved but one. The appellees were thus forced to raise the constitutional claims in two separate lawsuits involving differing methods for seizure of the children involved in each (pre-order seizure in the first case, attachment in the second), and hope that collateral estoppel—not res judicata—would remain as a defense. For the District Court to abstain on this basis would likely be an abuse of discretion:

> There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented.

Ohio Bureau of Employment Serv. v. Hodory, 431 U.S. 471, 481 (1977).

Similarly, the Appellants' claim that suitable procedures existed to raise the constitutional issues rings hollow in light of the facts. The Appellee family pursued the following procedures: (1) a motion to modify under Section 17.06 of the Texas Family Code, (2) an application for writ of habeas corpus to the district court in Harris County, and (3) an application to the state appellate courts for a writ of habeas corpus. Their motion was returned unfiled, and they were twice denied habeas corpus relief on jurisdictional grounds. *Sims v. State Department of Public Welfare,* 438 F. Supp. 1177, 1184 (S.D. Tex. 1977).

Finally, the Appellants argue that there was no deliberate disregard of Appellees' constitutional rights, or

"bad faith." Although the State's actions are not apposite to the campaign of persecution chronicled in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), discussed by this Court in *Younger, supra,* as an exceptional circumstance precluding comity oriented abstention, 401 U.S. at 53, the record in this case speaks to the State's disregard for the appellees' constitutional rights. The State secured three ex parte orders to obtain custody of the children of the family, and did not request citation nor seek to serve same on the Appellee parents after either of the first two orders were obtained. (Brief of Appellants, p. 6, 7). The State filed a suit affecting parent-child relations and sought the second ex parte order in Harris County after the state court there had found venue (as a result of Appellees' habeas corpus action) to lie in Montgomery County. (Appellants' Brief p. 7). When the District Court intervened to secure the return of the children after twenty days of illegal custody by the State, the State did not proceed with its first suit, then pending in Montgomery County, but proceeded to file yet another lawsuit in the same county and sought yet another ex parte order. (Appellants' Brief p. 8). The inescapable inference is that the State did not desire an adversary, and attempted service only after the federal court's intervention. (Appellants' Brief p. 8). Such has been Appellants' regard for the Appellees' constitutional rights.

Faced with this quagmire of litigation frustrating Appellees' attempts to raise their constitutional claims, the District Court found extraordinary circumstances militating against abstention. The District Court's characterization of the state court proceedings as "multifacited litigation" and "confusing", 438 F. Supp. at 1187, 1188, was charitable in view of the State's conduct in separating a

family for forty-two days. Even in enjoining the state proceedings, however, the District Court specifically drafted its order, and Appellants concede as much, to allow the State to continue to use some of its statutory procedures to remove children from immediate danger. (Jurisdictional Statement, p. 14) Rather than being indifferent to the principles of federalism, the District Court intervened judiciously to protect constitutional rights without unduly limiting the State's "sovereign capacity to protect its minor citizens." (Jurisdictional Statement, p. 20).

B. Authorities Cited By Appellant For Abstention Are Not Apposite To The Facts At Bar.

Appellants rely heavily for purposes of urging abstention on two recent decisions by this Court. *Judice v. Vail,* 430 U.S. 327 (1977) and *Trainor v. Hernandez,* 431 U.S. 434 (1977). In *Judice* this Court held that equitable restraint and comity required abstention where federal plaintiffs sought injunctive relief against enforcement of state contempt proceedings. The foundation for this decision was that the federal plaintiffs could have, but failed to, raise their constitutional claims in a single state proceeding; that they were not faced with further or repeated proceedings in state court; and that the state system afforded ample opportunity for them to be heard on their federal claims. In *Trainor* this Court held that abstention was required where federal plaintiffs sought declaratory and injunctive relief against the pre-judgment attachment of their bank accounts by the State of Illinois acting as a creditor. Unlike the parents in the case at bar, appellees in *Trainor* had not availed themselves of the meaningful forum that the State of Illinois had provided

to challenge the constitutionality of the state's actions. Also, unlike the final order entered below, the judgment of the District Court in *Trainor* totally prohibited the use of the state statutory scheme. Moreover, this Court found no harassment or bad faith on the part of the State of Illinois. Perhaps, the most important distinction between the case at bar and the authorities, including *Judice* and *Trainor,* cited by Appellants is that this case involves children, not bank accounts and not adults who have defied court orders. It is significant that Appellants have wholly failed to cite, discuss, or distinguish *Newton v. Burgin,* 363 F. Supp. 782, (W.D. N.C. 1973), *affirmed* 414 U.S. 1139 (1974). This case holds that the North Carolina child protection statutes allowing a five-day hiatus between the emergency removal of children from their parents' home and the parents' first day in court is unconstitutional. In so doing, the *Newton* District Court found that such a delay caused the parents

> a great and immediate, irreparable injury and that injury cannot be dissipated in the *defense* of the state civil proceeding.

Newton v. Burgin, supra, at 785. Any other result in the case at bar would not show due "sensitivity to the legitimate interests of both State and National governments." *Younger v. Harris, supra,* at 44.

II.

AN ARTICLE III CASE OR CONTROVERSY EXISTED BETWEEN APPELLEES AND APPELLANTS ON ALL ISSUES BEFORE THE COURT.

As an additional ground for undermining the decision of the Court below, Appellants assert that an Article III

case or controversy did not exist between Appellants and Appellees on the issues raised and decided by the District Court. We disagree.

Correctly noting that the "threshold inquiry" in a federal court is whether the plaintiff has standing to invoke the court's judicial powers", Appellants then proceed to conclude, based on misguided notions of standing, that the "statutes challenged by Appellees were not properly before the federal District Court." (Appellants Brief, pp. 25-26)

An analysis of Appellants arguments to support their conclusion reveals that their position is quite unsound and should be rejected.

It is now well established that, as a judicially developed procedural rule, standing finds its genesis in Article III of the Constitution, which limits the federal judicial power to actual "cases" or "controversies". *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 27, 37 (1976). The touchstone of any judicial analysis of an Article III standing question is whether the Plaintiff "has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin,* 422 U.S. 490, 498-499 (1975). The purpose of this inquiry is to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions" *Baker v. Carr,* 369 U.S. 186, 204 (1962). Thus, in addressing the question of Article III standing this court has consistently viewed the fundamental question as being whether Plaintiffs have alleged "injury in fact" from the challenged actions; *Singleton v.*

Wulf, 428 U.S. 106, 112 (1976); or the actual threat of injury.[1] *Doe v. Bolton,* 410 U.S. 179, 188 (1973). On the record in this case it is clear that this query is to be answered affirmatively. Appellees have suffered, to the hands of the state, the following: (1) an unilateral seizure of their child without notice or prior judicial approval; (2) the issuance of two ex parte orders by the state district Court appointing the State Department of Human Resources as the temporary managing conservator, and one ex parte writ of attachment on their son; (3) the storing of information on Appellees in the Child Abuse Reporting System with the threat of dissemination, the veracity of which had not been tested through an adversarial process; (4) and a pending suit seeking that the rights and responsibilities of raising their child be placed in the hands of the state.[2] (See Appellees Brief, pp. 5-9) As a result of these actions by the State, Appellee, believing that the actual and threatened removal procedures utilized by the state, were in derogation of their constitutional rights, sought federal judicial intervention. To say that the Appellees had not alleged and suffered injury in fact simply belies reality. Nor can there be any question that challenged actions of the state were taken pursuant to and in accordance with the state statutes[3] under attack by Appellees.

1. For the purposes of standing the injury or actual threat thereof, may well be noneconomic in nature. See, *Data Processing Service v. Camp,* 397 U.S. 150, 154 (1970).

2. Where the burden of proof on the state would have been by a preponderance of the evidence. See § 11.15 of the Texas Family Code. In this regard, the existence of pending litigation renders it impossible for us to conceive of a greater threat of "putatively illegal action", *Warth v. Seldin, supra* at 499.

3. Although state law did not prohibit the appointment of an Attorney Ad Litem, at the ex parte hearing, it is nevertheless clear that Appellees, as the natural parents of the children, have standing to raise this issue on behalf of their children, See e.g. *Smith v. Organization of Foster Families,* 431 U.S. 816, 840. Of course, it goes without saying, that the minor plaintiffs who were not represented by an Ad Litem at the ex parte hearing have standing to raise this claim. *Smith v. Organization of Foster Families.* Id.

Thus, it is clear that Appellees have suffered "some threatened or actual injury resulting from the putatively illegal action . . ." *Linda R. S. v. Richard D.* 410 U.S. 614, 617 (1973); and, inasmuch as the injuries were a direct result of Appellants[4] efforts to intercede, Appellees were in a posture to have their injuries redressed by a favorable decision by the federal District Court. *Simon v. Eastern Kentucky Welfare Rights Organization, supra* at 38. For these reasons then, Amicus submits that on Article III a case or controversy existed between Appellants and Appellees on all of the issues raised and decided by the court below.

Any further consideration of the question of standing would be a prudential matter, with the inquiry turning to whether or not plaintiffs are the "proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulf,* 428 U.S. at 112. Considering the rather expansive scope of injuries suffered by Appellees it is difficult, if not impossible, to conceive of a more appropriate advocate than they. Unlike the plaintiffs in *Singleton v. Wulf, supra* or in *Simon v. Eastern Kentucky Welfare Rights Organization, supra* Appellees are not seeking to base their legal position on the rights

4. Among the Appellants is the Director of the Harris County Child Welfare Unit of the State Department of Public Welfare, who is the chief administrative officer of that local agency. (A-12). As such, it was this Appellant who was responsible for the decision to initiate the conservatorship proceedings against Appellees. (Appellants' Brief p. 6)

of third parties, but instead build the foundation of their claim on their own rights to privacy, integrity of the family unit, and due process of law.[5] *See e.g. Smith v. Organization of Foster Families.* 413 U.S. 816 (1977) Accordingly, those prudential considerations usually attendant to cases where even though the plaintiffs have sufficiently established injury in fact, their legal arguments are based upon the rights of others,[6] *See e.g. Craig v. Boren* 429 U.S. 190 (1976), are simply nonexistent here. It is on this basis that, Amicus submits that not only do Appellees have Article III standing but that they are the most appropriate proponents of the particular "legal rights on which they base their suit." *Singleton v. Wulf, supra,* 428 U.S. at 112.

Finally, we note that among Appellants' contentions regarding the lack of an Article III case or controversy is that they are the wrong Defendants for Plaintiffs to sue, and therefore the requisite controversy does not exist, since they do not have the power to "perform the function desired as relief." (Appellants Brief, p. 32). This grossly misperceives the nature of the controversy giving rise to the ultimate relief granted by the District Court—the injunction against further application and enforcement of the challenged statutes. See e.g., *Dombrowski v. Pfister,* 380 U.S. 479, 497 (1965). The ve-

5. Including those of the minor plaintiffs, Sabrina Sims, Paul Sims, and Shawana Sims.

6. In *Singleton v. Wulf,* this Court explained the rationale behind prudential considerations as follows: "First the courts should not adjudicate such rights unnecessarily, and it may be in fact the holders of these rights do not wish to assert them. . . . Second, third parties themselves usually will be the best proponent of their own rights." *Singleton v. Wulf,* 428 U.S. 106, 133. As previously stated, in this case, neither consideration is germane to the issue.

hicle by which the Court reaches its conclusion to enjoin the state from further proceedings is, of course, that the removal procedures set forth in the statute and utilized by Appellants here does not provide constitutionally adequate safeguards for a threatened family, such as Appellees. In this regard, Appellants reliance on *Rizzo v. Goode,* 423 U.S. 362 (1976) is completely misplaced. In *Rizzo* the cornerstone of this Court's finding that the individual plaintiffs lacked standing was, that the threat of injury in the future was not from Defendants, but instead from a minority of policemen who operated under misguided notions of the Department's disciplinary procedure. Unlike the case sub judice, there was *no showing* that these actions were pursuant to any regulations or formal policy regarding such conduct. *Rizzo, supra* 423 U.S. at 371-373.

Here, the causation is not attenuated but is linked to the action of Appellants who, by law, have the direct responsibility of carrying out and enforcing the statutes under attack in this litigation (A-11-A-23). *See, e.g. Wooley v. Maynard,* 430 U.S. 705 (1977). *Accord, Monell v. Department of Social Services,* ____U.S.____, 54 L.Ed.2d 6111 (1978). The order of District Court, did not, as the State would have this court believe, direct them to perform any function other than ceasing to enforce the facially constitutionally deficient statutes. See, *Dombrowski v. Pfister,* 380 U.S. at 497. Inasmuch as this was clearly within their power to do, the state's argument to the contrary is without merit.

For, these reasons amicus submits that all Appellants arguments relating to an Article III case or controversy should be rejected.

III.

THE CHALLENGED PORTIONS OF THE CHILD ABUSE STATUTES ARE UNCONSTITUTIONAL.

Arguing that the District Court exceeded the bounds of established due process standards, the Appellants attack the District Court's holding that the failure to secure judicial authorization prior to or on the very day of the extra judicial seizure is violative of fundamental notions of due process. Amicus submits that the position taken by Appellants on this issue contravenes firmly established decisions of this court.

Recognizing that the "custody, care and nuture of the child reside first in the parents, whose primary function and freedom include preparation of obligations the state can neither supply nor hinder." *Prince v. Massachusetts,* 321 U.S. 156, 166 (1944); this court has accorded both substantive and procedural protections to certain areas of family life, especially where the state is seeking to interfere with the parent-child relationship. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205 (1972) and *Stanley v. Illinois,* 405 U.S. 645 (1972). For this reason, this Court has been zealous in its scrutiny of state interference with the parent-child relationship, *Stanley v. Illinois, supra,* inasmuch as the "liberty interest in family privacy has as its source, and its contours are ordinarily to be sought, . . . in intrinsic human rights, as they have been understood in 'this nation's history' ". *Smith v. Organization of Foster Families, supra,* 431 U.S. at 845. Although the parties are in agreement that these fundamental propositions mandate that the state provide some procedural protections to the threatened family unit, they are in substantial disagreement as to what process is

due. Basing their arguments on notions of administrative burden and misguided views of the balancing of the parties' interest, the state attacks the District Court's finding that due process requires judicial approval of the State's action on the very day in which it takes place (Appellants' Brief pp. 40-41). We disagree.

It is now beyond cavil that due process is a flexible concept which "calls for such procedural protections as particular situation demands." *Morrissey v. Brewer,* 408 U.S. 471, 481 (1971). In *Matthews v. Eldrigge,* 424 U.S. 319 (1976) this court outlined the contours of the considerations in balancing the interests of the adverse parties:

> First, the private interest that will be affected . . . second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved in fiscal and administrative burdens that additional or substitute procedural requirements would entail.
>
> 431 U.S. at 848-849

The private interest affected is the right to family privacy and to the integrity and preservation of the family unit, an interest which this court has previously described as having its source "not in state law, but in intrinsic human rights." *Smith v. Organization of Foster Families,* 431 U.S. at 845. It is an interest which comes to this court "with a momentum for respect lacking when appeal was made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois, supra,* 405 U.S. at 651. Quite clearly then, the interest is a substantial, if not, a fundamental one.

Turning to the second inquiry, Amicus submits that absent the procedures mandated by the District Court the risk of an erroneous deprivation is substantial. Reduced to its simplest form the allowance of the extra judicial seizure of the child in an "emergency" situation places in the hands of the state, the absolute unfettered discretion in determining the sufficiency of the need to deprive the family unit of its fundamental liberty interest. It is quite clear that rudimentary notions of due process dictate that before one can be deprived of a fundamental interest the grounds for the deprivation must be reviewed by judicial authority. *Fuentes v. Shevin,* 407 U.S. 67 (1972). Accord, *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974). We believe absent this minimal requirement, the risk of a wrongful deprivation of this fundamental right is heightened to a constitutionally intolerable level. The minimal protections required by the District Court in this case, at the very least guarantee the legal and factual sufficiency of the State's basis for the seizure,[7] eschewing procedure by presumption, thus protecting the "fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize government officials . . ." *Stanley v. Illinois, supra,* 405 U.S. at 656.

Amicus does not question the State's interest in protecting children from neglectful or abusive parents but

7. The only basis upon which an extra judicial seizure may take place is stated in § 17.01 of the Texas Family Code, which provides in pertinent part, that the State may take possession of the child "to protect him from an immediate danger to his health or physical safety . . .". § 17.01 of the Texas Family Code. What constitutes "an immediate danger to his health or physical safety" may be subject to varied interpretations depending upon the individual welfare worker assigned to the case.

we think that due process requires that the State employ those procedures which do not "needlessly risk[s] running roughshod over the important interest of both parent and child." *Stanley v. Illinois, supra,* 405 U.S. at 657. To the extent that § 17.01 of the Texas Family Code did not require that an independent judicial authority review both the legal and factual sufficiency of the State's grounds for intrustion into the family unit, either prior to or on the very day of the seizure, it contravenes this concept and therefore cannot stand. The District Court's minimal protections of the rights of both the parents and the children should be affirmed. Cf., *Smith v. Organization of Foster Families, supra,* 431 U.S. at 850.

Finally, this Court will inquire into the administrative burdens that the additional procedures would entail. The only argument which the State makes in this regard is simply the difficulty in getting to a judge to present their request for an ex parte order. We simply cannot conceive that this "burden" outweighs the possibility of the harmful consequences which could result from a precipitious and improvident decision to remove the child from the family unit. In the area of property interests, an area which we submit is far less fundamental than the one involved here, this Court has previously found as constitutionally acceptable procedures which allow review of the basis for the ex parte seizure, by independent judicial authority, prior to the actual deprivation. See, *Mitchell v. W. T. Grant Co., supra,* 416 U.S. at 617. At the very least, due process requires that a similar procedure be utilized here, and the State's claim that their interest in protecting children from "an immediate danger" outweighs the family interest in pro-

tecting against an erroneous deprivation should be completely rejected.[8]

IV.

CONCLUSION

For the foregoing reasons, this *Amicus* respectfully submits that the opinion of the three-judge District Court below should be affirmed in all respects.

Respectfully submitted,

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8. We note, that the "burden" on the State is no different than that placed on the general bar when faced with extreme situations where they are in need of a restraining order in order to protect either the economic or non-economic interest of their client. Of course, this would include obtaining restraining orders in domestic relations cases where the attorney is seeking to protect his client from threats of physical abuse by the spouse.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief Amicus Curiae of East Texas Legal Services, Inc., has been forwarded to all counsel of record in this cause by depositing the same in the United States mail, postage prepaid on this 12th day of January, 1979.

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FOR ARGUMENT

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IN THE

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OCTOBER TERM, 1978

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Appellant,

—against—

JOHN PLEASANT SIMS, *et al.*,

Appellees.

ON APPEAL FROM THE JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC. AND WESTCHESTER LEGAL SERVICES, INC.

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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78-6

Hilmar G. Moore, et al.,

Appellant

-against-

John Pleasant Sims, et al.,

Appellees

On Appeal From The Judgment and Order
of the United States District Court
for the Southern District of Texas

BRIEF OF COMMUNITY ACTION
FOR LEGAL SERVICES, INC. and
WESTCHESTER LEGAL SERVICES, INC.
AMICI CURIAE

Community Action for Legal Services, Inc. ("CALS") respectfully submits its brief as amicus curiae to this Court. CALS is joined in this brief by Westchester Legal Services, Inc.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the

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*The letter(s) of consent have been filed with the Clerk of this Court.

National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court.

Approximately 20% of the cases handled

bu CALS' neighborhood legal services offices is in the area of family law. These cases include domestic relations matters, child protective proceedings, various foster care review proceedings, proceedings for termination of parental rights and adoption proceedings.

Since the inception of its program in 1967, CALS attorneys have provided representation to respondent parents charged with child abuse or child neglect in child protective proceedings (New York Family Court Act, Article 10) in the Family Court of the City of New York in at least 4,000 cases. CALS associated attorneys have handled many reported cases involving child protective proceedings and related areas of family law, including Smith v.

Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith 422 F. Supp. 460 (E.D.N.Y. 1976) aff'd, 547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M. 37 N.Y. 2d 622 (termination of parental rights); Matter of Orlando F. 40 N.Y. 2d 103 (1976) (termination of parental rights); Matter of Susan F. 59 A.D. 2d 783, 398 N.Y.S. 2d 903 (1977)(validity of retroactive extension of placement in child neglect proceedings); Matter of Daniel C. 47 A.D. 2d 160, 365 N.Y. S.Ct. 535 (illegal detention of children; standards and procedures for determination of child neglect); Matter of Hanson 51 A.D.

2d 696, 379 N.Y. S.Ct. 415.

Westchester Legal Services, Inc., is a non-profit corporation which is funded by the Federal Legal Services Corporation Act for the purpose of providing legal representation to low-income persons in civil cases. 42 U.S.C. Secs. 2996 et seq. The program has twelve regular staff attorneys, and operates offices in White Plains, Mount Vernon, New Rochelle, Peekskill and Yonkers, New York.

Attorneys associated with Amici Westchester Legal Services, Inc., have had extensive experience in child neglect proceedings, as well as other types of family litigation in the New York Family Court. Among the reported family law cases handled by Amici during the past decade are Matter of Ella B., 30 N.Y. 2d 352 (1972) (right to assigned counsel in child neglect proceeding); Bennet v.

Jeffreys, 40 N.Y.2d 543 (1976); Matter of Peters, 67 Misc.2d 498 (Fam.Ct. West Co. 1971) (Burden of Proof in child neglect proceeding); People ex. rel. A.Amandola v. Jackson, 74 Misc.2d 797(Sup.Ct.West.Co. 1973) (right to assigned counsel in support-contempt proceeding); People ex. rel. Magnero v. Jackson, 73 Misc.2d 740 (Sup. Ct. West. Co. 1973) (right to counsel in family offense-contempt proceeding); Wynn v. Family Court, 8 Clearinghouse Review 301 (1974) (consent decree; right to a prompt hearing after emergency removal of child from parent).

In the course of their extensive experience with child protective proceedings Amici have frequently encountered the practice of summary removal of children from their homes at the time of or prior to the filing of a petition alleging child

abuse or child neglect and have been disturbed both by the laxity of legal procedure which characterizes such removals and by the devastating human suffering which is caused by these emergency measures.

While there are naturally many differences between the statutory schemes which govern child protective proceedings in Texas and New York, respectively, the procedure provided for emergency preliminary removal of children in New York corresponds in several important respects to the Texas procedures under review on this appeal.*

As in Texas, New York permits summary removal of children prior to or at the time of commencement of child protective proceedings on the basis of a court order issued ex parte. Parents do not have to

*New York Family Court Act Article 10, Secs. 1022-1028; 1031, 1035, 1036, 1041. Title 2 Texas Family Code Chapters 17 and 11.

be notified that the order will be sought; proof of efforts to notify parents is not required, nor need the parents be served with the removal order after it is made, N.Y.F.C.A.*Secs. 1022-1027; Texas Family Code Secs. 17.02-17.05. As in Texas, the ex parte order of removal is signed neither on the basis of sworn affidavits nor sworn testimony. In Amici's experience, the issuance of the order is purely a "rubber stamping" procedure. N.Y.F.C.A. Secs. 1022-1023,1027.

New York statutes, like those of Texas, do not require the state to provide adequate notice to the parents and to hold a full adversary hearing on the need for removal, promptly following the entry of the ex parte removal order. In New York, as in Texas, once a child has been removed from his or her parents, the burden is on the parents to demand a hearing for the return of the child, although parents are

*New York Family Court Act.

not informed that such a hearing may be requested. N.Y.F.C.A., Secs. 1027-1028, Texas Family Code Secs. 17.02-17.06.*

Amici have found that parents charged with child neglect are rarely served with process and with a copy of the petition either shortly after the commencement of child protective proceedings or at any meaningful time. Secs. 1035(b)-1036(b).

While long aware of and concerned with the constitutional propriety of these procedures, Amici have found the legal issues surrounding preliminary seizure of children from their homes to be extremely difficult to litigate. As in Texas, the alleged illegality of the summary seizure of a child cannot be raised as a defense to the child protective proceeding, interlocutory appeals are rarely

*All references to Texas Family Code are to its Title 2 provisions.

available* and once a hearing has been held, the issue of removal becomes moot.

In addition, most parents do not secure counsel till considerably after the child has been removed. So detrimental is the effect of involuntary separation of parents and children that by the time counsel is obtained, concentration must be on the efforts to secure a return of the child as quickly as possible.

Accordingly, Amici submit their brief, focusing the Court's attention on selected

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*They are permitted in abuse but not neglect cases N.Y.F.C.A. Secs. 1012, 1112; however, abuse was alleged in only 20% of the cases processed. State of New York, Twenty-Third Annual Report of the Judicial Conference & Office of Court Administration, 1978, 270 Broadway, New York, N.Y. pp. 39-41.

issues raised by this appeal, because of their concern about the very direct impact of this case on their clients.

QUESTIONS PRESENTED

1. Whether in light of this Court's decision in Younger v Harris, 401 U.S. 37, the district court properly granted injunctive relief against those aspects of Texas child protective proceedings, which authorized summary ex parte removal of the Sims children from their parents and home?

2. Whether Texas Family Code, Chapter 17, Secs. 17.02, 17.03, 17.05, 17.06 and Texas Family Code, Chapter 11, Sec. 11.11(a)(4) violate the due process clause of the Fourteenth Amendment to the Constitution of the United States insofar as they authorize the summary seizure of children from their parents, pursuant to an ex parte court order without requiring (a) that efforts be made to serve notice of the ex parte application on the parents; (b) without requiring that the ex parte removal hearing be held on

the day the child was seized; and (c) without requiring that the state hold an adversary hearing on the propriety of the seizure on adequate notice to the parents, no later than 10 days after the initial seizure of the child?

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case involving a challenge by Appellees parents upon the constitutionality of state procedures under the Texas child abuse and neblect reporting system, the Texas proceeding for the summary emergency removal of an allegedly abused and neglected child from parents and home, and the Texas "Suit Affecting the Parent-Child Relationship." The district court found that certain of the

challenged Texas procedures did in fact offend due process.

Amici do not submit this brief in order to present the Court with exhaustive argument on every aspect of this case. Amici in this brief have briefed certain issues relating to the summary seizure of children from their parents without prior notice and hearing. The issues selected are those with which Amici have had the most experience.

I

The Court below correctly concluded that the doctrine of Younger v. Harris,401 U.S. 37, is inapplicable to the relief it granted against the procedures for summary removal of a child from the home, because there were no pending state court proceedings in which plaintiffs could have presented their con-

stitutional claims by way of defense. Plaintiffs could not have raised these claims as a defense to the Juvenile Court proceedings pursuant to Chapter 17 because they were not entitled to notice of that proceedings,Sec. 17.03. The only issue relevant on a parent's motion to modify is "the best interest of the child," Section 17.06. No notice was given to parents of the proceeding pursuant to Chapter 11 which followed. Thus, during the entire period that plaintiffs were deprived of their children, there was no opportunity for them to litigate their constitutional claims. Moreover, once the duration of the ex-parte deprivation of custody ended, the constitutional issue became moot. In any event, federal relief against the initial ex-parte proeedures

will not directly interfere with the state adjudicatory hearing.

II

When Texas state officials seized the Sims children, obtained an ex-parte order of seizure and thereafter detained the children for 42 days without providing their parents with notice and hearing, they interfered with constitutionally protected reciprocal familial rights of parents and children. Stanley v. Illinois, 405 U.S. 645, held that due process applied to state coerced removal of children from their parents,and, that parents must have notice and a hearing before their child can be taken from them.

Nevertheless, summary seizure has been allowed in extraordinary situations such as are presented by imminent danger to a

child's life or health. In case of such danger the state should be able to provide the child with immediate protection.But after seizure, the interests of parents and children in not being arbitrarily separated becomes paramount. The separation of parents and children is traumatic to all, is very harmful to children and there is a high risk of error in emergency decisions. Accordingly, procedures immediately following summary seizure of a child should confirm promptly, applying high standards of procedural protection, whether the seizure was necessary. The detailed procedural requirements described by the district court were appropriate to the case.

ARGUMENT

I.

YOUNGER V. HARRIS WAS INAPPLICABLE TO THE TEMPORARY REMOVAL OF CHILDREN FROM THE HOME BECAUSE THE PARENTS HAD NO OPPORTUNITY TO RAISE THEIR CONSTITUTIONAL CLAIMS IN THE SUMMARY, EX PARTE PROCEEDING THAT AUTHORIZED THE REMOVAL.

The court below granted relief against various aspects of Texas' child abuse proceedings. Amici will only discuss the applicability of the doctrine of Younger v. Harris, 401 U.S. 37 (1971) to the relief granted by the court below against the procedures authorizing the temporary removal of a child from the home. (Texas Family Code, Chapter 11, Sec. 11.11(a)(4)). Amici will focus on those procedures because they involve a drastic infringement upon constitutionally protected rights and yet are particularly resistant to review by state courts.

It is Amici's position that the court below correctly concluded that the Younger doctrine is inapplicable to this relief because during the period of the temporary removal of plaintiffs' children from their home, there was no pending state court proceeding in which plaintiffs could have presented their constitutional claims.

The Younger policy of equitable restraint "is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." Kugler v. Helfant, 421 U.S. 117, 124 (1975). This court has held that when the pending state proceeding provides a fair opportunity to litigate federal constitutional issues, federal interference not only interferes with the state adjudicatory process but it also

results in duplicative legal proceedings and may reflect negatively on the state court's ability to enforce the Constitution. Judice v. Vail, 430 U.S. 327, 97 S. Ct. 1211, 1218 (1977); Huffman v. Pursue, 420 U.S. 592, 604 (1975); Younger v. Harris, supra at 43. According to this rationale, the essential predicate of Younger is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." Huffman v. Pursue, supra at 594; Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

This Court has thus ruled that the Younger "principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'" Steffel v. Thompson, 415 U.S. 452, 462 (1974); Lake Carriers Association v. MacMullan, 406 U.S. 498, 509 (1972). See also, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Allee v. Medrano,

416 U.S. 802, 814 (1974). When no state court proceeding is pending, federal relief will not interfere with the state judicial system; it "does not result in duplicative legal proceedings" and it cannot "be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles." Steffel v. Thompson, supra at 462.

For these same reasons, this Court has determined Younger to be inapplicable when the constitutional claim could not fairly be raised as a defense to the pending state proceeding. Gerstein v. Pugh, 420 U.S. 103, 108 n.9 (1975); Gibson v. Berryhill, supra. In Trainor v. Hernandez, 431 U.S. 434, 97 S.Ct. 1911, 1920 (1977), this Court remanded the action to the district court in order to specifically determine whether

the constitutional claims could have been presented in the pending state proceeding. See also, Trainor v. Hernandez, 97 S. Ct. supra at 1930 (Stevens, J., dissenting).

The constitutional claims asserted against the emergency removal procedures could not have been raised as a defense to the pending Juvenile Court proceedings. The contested state provisions authorize the removal of a child for a 10-day period upon the filing of a petition without notice to the parents. Texas Family Code, Sec. 17.01 - 17.05. While the contested provisions provide that a parent may make a motion to modify the emergency order, Texas Family Code, Sec. 17.06, this remedy does not provide an adequate remedy to raise the constitutional issues because (1) the parent has received neither notice of the ex parte proceeding or the availability of relief pursuant to section

17.06, and (2) the only issue relevant on such a motion is "the best interest of the child." Texas Family Code, Sec. 17.06.

Even if state law authorized the court to determine the procedural due process question, a motion to modify an emergency order is not an appropriate vehicle to litigate constitutional issues. Since the child has been removed from the home under allegedly emergency circumstances, the essential if not sole inquiry at this stage must be the proper placement of the child rather than resolution of any constitutional question.

The Court below found that:

> "(i)t is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County." Sims v. Department of Public Welfare, 438 F. Supp. 1179, 1184 (S.D. Tex. 1977).

Thus, during this entire period in which plaintiffs were deprived custody of their children, there was no pending state proceeding in which constitutional claims could have been litigated. As the three-judge court concluded in Newton v. Burgin, 363 F. Supp. 782, 785 (W.D. N.C. 1973), aff'd, 414 U.S. 1139 (1974):

> "This five-day separation is clearly an injury to the parent which occurs before he or she has a chance to defend his or her right to custody in a civil proceeding, and it is an injury which occurs regardless of the outcome to the civil proceeding."*

The Court in Newton thus found that Younger was inapplicable.

Moreover, once the duration of the ex parte deprivation of custody ends and the plenary "suit affecting the parent-child relationship" has commenced, the injury the plaintiffs are complaining about, i.e., the deprivation of custody without a prompt hearing, will have occurred and the constitutional issue will be moot. See Trainor v. Hernandez, 97 S.Ct. supra at

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*The summary removal of a child from his or her natural parents may also cause the child irreparable injury. Roe v. Conn, 417 F. Supp. 769, 776 (N.D. Ala. 1976) three-judge court). See Point II, infra.

1930 (Stevens, dissenting). Developments of the Law - Section 1983 and Federalism, 90 Harvard Law Review, 1135, 1319 n252 (1977). Therefore, the constitutionality of the ex parte removal procedures cannot be raised as a defense to the plenary action. Amici and other legal services attorneys have experienced similar difficulties and frustrations in attempting to litigate their constitutional claims in the context of Family Court proceedings. The lower federal courts have correctly ruled that when the family or juvenile court proceeding does not provide an adequate opportunity to litigate the constitutional issue, the principles of Younger do not preclude federal court relief. Alsager v. District Court, 518 F.2d 1160, 1166

(8th Cir. 1975); Cleaver v. Wilcox, 499 F.2d 940, 943-944 (9th Cir. 1974); Conover v. Montemuro, 477 F.2d 1073, 1080-1082 (3d Cir. 1973); Doe v. Maher, 414 F.Supp. 1368, 1376-1377 (D. Conn. 1976), vacated and remanded, 97 S.Ct. 2474 (1977); Newton v. Burgin, 363 F.Supp. 782 (W.D. N.C. 1973), aff'd, 414 U.S. 1139 (1974).

In addition to the fact that the pending state proceeding does not provide an adequate opportunity to litigate the federal constitutional issues, federal relief will not directly interfere with the state adjudicatory hearing, but only with the initial ex parte procedures. See Gerstein v. Pugh, 426 U.S. 103, 108 n.9 (1975); Fuentes v. Shevin, 407 U.S. 67, 71 n.3 (1972); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Conover v.

Montemuro, 477 F.2d 1073, 1080-1082, (3d Cir. 1973); Developments in the Law - Section 1983 and Federalism, 90 Harv. L. Rev. 1135, 1318-1321 (1977). In Conover v. Montemuro, supra, the Third Circuit ruled that Younger principles did not bar federal court relief against juvenile delinquency intake procedures because "relief with respect to the intake procedures will not necessarily hinder the eventual adjudicatory process of the (state) Court...." Id. at 1082. Similarly, in the instant case, federal relief against the ex parte removal procedure will not interfere with the Juvenile Court child abuse prosecution.

This Court's decision in Trainor v. Hernandez, supra, is not inapposite. In that case, the Court concluded that the contested order of attachment was "very

much part of the underlying action for fraud." Trainor v. Hernandez, 97 S.Ct. supra at 1919 n. 9. The attachment was necessary in order to insure that there be assets available should the state court plaintiff obtain a judgment. The attachment was thus closely related to the effectuation of the final judgment. In the instant case, the initial ex parte emergency removal, analytically, is not entwined with the final judgment.

Even if plaintiffs' constitutional claims could have been litigated in a state court habeas corpus proceeding, this would have no relevancy to the Younger issue. Younger presupposes the ability to fairly litigate the federal constitutional

issues in the pending state proceeding.* It does not require a party to institute a separate proceeding. See Newton v. Burgin, supra at 785. Requiring the institution of state judicial proceedings in order to litigate a constitutional claim in effect would require the federal court plaintiff to exhaust state judicial remedies, Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). This would be contrary to the well established rule that exhaustion of these State judicial remedies is not required in order to commence a Section 1983 action. Monroe v. Pape, 365 U.S. 167, 183 (1961). Accord, Ellis v.

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*In fact, the Court below found that this remedy was unavailable to plaintiffs Id. 438 F.Supp. 1179 at 1184.

Dyson, 421 U.S. 426, 432-433 (1975); Steffel v. Thompson, supra at 472-473.

In sum, because there was no pending state proceeding in which plaintiffs' constitutional claims could be raised, the Court below correctly held that Younger did not bar it from granting procedural due process relief against the provisions of Texas law authorizing the ex parte removal of the children.

II

THE TEXAS PROCEDURES (TEXAS FAMILY CODE, CHAPTER 17 and 11.11(a)(4)) GOVERNING EMERGENCY SEIZURE OF ALLEGEDLY ABUSED OR NEGLECTED CHILDREN FROM THEIR PARENTS VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

When Texas state officials seized the Sims children, secured an ex-parte court order and subsequently detained the children for 42 days without providing their parents with notice and hearing, they drastically interfered with "a basic liberty" fundamental to the very existence of the human race, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Indeed, "freedom of personal choice in matters of marriage and family life" Cleveland Board of Education v. La Fleur, 414 U.S. 632, has a preeminent place in a constitutional order. An aspect of that freedom, the right of parents to "conceive and raise children" Meyer v Nebraska,

290 U.S. 390, to enjoy their "care, custody and companionship," May v Anderson, 345 U.S. 528, has repeatedly been recognized by this Court, Meyer v Nebraska, supra, May v Anderson, supra; Pierce v Society of Sisters, 268 U.S. 510; Armstrong v Manzo, 380 U.S. 545; Stanley v Illinois, 405 U.S. 645; Wisconsin v Yoder, 406 U.S. 205. Important interests of children are implicated as well, as they are perceived to have a reciprocal right to their parents' care and companion-

ship, Duchesne v Sugarman, 566 F. 2d 817, 825, (2d) Cir. 1977).* Moreover, while its proper purpose may be protection of the child from harm, the experience of summary seizure of a child is akin to arrest. Id at 828 fn. 24.

*This reciprocal complex of rights, apparently following upon this Court's reference to "the integrity of the family unit" in Stanley v Illinois, 405 U.S. 651, is sometimes referred to as the right to 'family integrity.' Cf. Alsager District Court of Polk County Iowa, 406 F. Supp. 10 (S.D. Iowa 1975) aff'd 545 F. 2d 1147 (8th Cir 1976); Roe v Conn, 417 F. Supp. 769, 777 (M.D. Ala. 1976); Duchesne v Sugarman 566 F. 2d 817, 824, (2d Cir 1977). It is protected as liberty by the due process clause of the Fourteenth Amendment, Meyer v Nebraska, supra, at 399; under the principle of privacy, Griswold v Connecticut, 381 U.S. 479 (1965), Roe v Wade, 410 U.S. 113 (1973), Eisenstadt v Baird, 405 U.S. 438 (1972); and by the equal protection clause of the Fourteenth Amendment, Stanley v Illinois, supra.

There is thus no question as to the applicability of the due process clause to state coerced removal of children from their parents' custody. In Stanley v Illinois, supra, this Court, while acknowledging the state's right to protect minor children through judicial child neglect proceedings, specifically held both that due process clause was applicable and that it requires that parents be provided with notice and hearing on their "fitness" prior to the taking of their child by the state. That holding is not in question in this case. Stanley was concerned with the necessity for and timing of a hearing on the merits in cases where the ultimate relief was to be the taking of a child from his or her parents.

The question here is whether and by what process the state can detain a child, from his parents summarily and independently of the eventual determination of a child protective case on the merits*

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*Neither in Texas nor in New York does a finding of abuse or neglect necessarily result in the separation of a child from his parents. See Texas Family Code, Chapter 14 ; N.Y.F.C.A. Sec. 1052-1057. In New York in 1977 and 1976, only 28% and 30% of cases involving abuse resulted in placement of the child away from home. State of New York, Report of the Judicial Conference and Office of Court Administration 1978, p 43; 1977 pp 39-40.

While the summary seizure of a child at or prior to the actual commencement of proceedings charging parents with child abuse or neglect without either notice or prior hearing clearly deviates from the rationale of the Stanley case, it is difficult to argue that due process totally prohibits summary seizure of a child in child protective cases. This Court has allowed that "(t)here are 'extraordinary situations' that justify postponing notice and opportunity for a hearing." Fuentes v Shevin, 407 U.S. 67, 90. Further, protection of children from imminent death, disfigurement or other form of extreme physical injury is an "important governmental interest" Fuentes v Shevin, supra at 91. See also Newton v Burgin, 363 F.

Supp. 782, 786 (W.D.N.C. 1973) aff'd 414 U.S. 1139 (1974). Hence, Amici agree with the parties and Court below that "where real, immediate and irreparable physical harm is likely the state has an interest in taking so-called 'emergency' possession of the children." Sims v State Department of Public Welfare, 438 F. Supp. 1179, 1189-90 (S.D. Texas 1977).

Because they involve serious deviations from due process norms, this Court has held in cases of summary seizure of property interests that the occasions for such seizures "must be truly unusual" Fuentes v Shevin, supra, at p 90, and that the need for the seizure be determined "under the standards of a narrowly drawn statute." Id at

p 91. In North Georgia Finishing v Di Chem, Inc., 419 U.S. 601, a summary seizure case involving pre-judgment garnishment without prior notice and hearing, this Court noted as a defect the absence of a "provision for an early hearing at which the creditors would be required to demonstrats at least probable cause for the garnishment." Id at 607. At least as much should be required in cases of summary seizure of children.

The determination of what due process requires in a given context depends on a consideration of both the nature of the governmental purpose involved and the private interests affected. Cafeteria Workers v McElroy, 367 U.S. 886,895 (1961); Goldberg v Kelly, 397 U.S. 254, 263-266 (1970). In the context

of the summary seizure of children in this case, Texas' interest is in being able to protect children "in immediate danger" of abuse as quickly as possible. That interest is immediately and entirely satisfied when Texas public officials take possession of a child without any handicapping barriers, as they are authorized to do by Texas Family Code Section 17.01. However, as soon as the child is in the state's protective custody, the powerful countervailing interests of parents and children,in not being arbitrarily or improvidently or mistakenly separated, become predominant.

It would be wrong to presume that an emergency seizure intended to protect a child from harm is inevitably beneficial. On the contrary, there is growing revulsion among legal as well as child welfare

professionals against excessive resort to such seizures. Removal is recommended only as a last resort, because of its tremendous potential harm to the child, Roe v Conn, 417 F. Supp. 769, 776-777 (M.D. Ala. 1976). See also Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards, 27 Stanford Law Review 985 (April 1975); American Bar Association, Juvenile Justice Standards, Standards Relating to Abuse and Neglect (Tentative Draft 1977) pp 78-88; R. Bourne and E. H. Newberger, "Family Autonomy" or "Coercive Intervention" 57 Boston University Law Review 670, p 689 (No. 4 July 1977); McCathren, Accountability in the Child Protection System, 57 Boston University Law Review 707, pp 710-711 (No. 4 July 1977).

Sudden involuntary and unexpected

separation of a child from his parents, even for a short period of time, is a terrifying experience for any child. Young "Placement from the Child's View," 31 Social Casework (1950); Bowlby, Maternal Care and Mental Health, Monograph No. 2, World Health Organization, 1952. Amici can attest from their own experience with their clients that also for parents the process of having one's child precipitously removed is an extremely traumatic experience. Cf. S. Jenkins & E. Norman, Filial Deprivation and Foster Care (1972).

Because of their indeterminate and subjective nature, the risk of error inherent in both social work and judicial child placement decisions is high. Phillips, et al.,Factors Associated with

Placement Decisions in Child Welfare (Child Welfare League of America 1971); Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminancy 39 Law & Contemporary Problems 226 (1975); Levine, Caveat Parens A Demystification of the Child Protection Process, 35 University of Pittsburgh Law Review 1 (1973). Racial and class bias often play a substantial role in these decisions, Levine, supra, Roe v Conn, supra.

In the case of a summary seizure of a child, the risks of improvident action are dramatically increased. In Amici's experience, the amount and quality of the hastily assembled information relied on as a basis for the summary seizure of a child is frequently low. Title 2 Texas Family Code Secs. 34.05(d) acknow-

ledges by its terms that summary removal may be resorted to "before the investigation is complete."

The experience in New York where, as in Texas, summary removal is based on "imminent danger to life or health," N.Y.F.C.A. Sec. 1027, supports this analysis. Of 4,916 child abuse or neglect proceedings, disposed of in New York in 1977, a finding of child abuse was made in 6% of the cases filed. In 44% of the cases, neither abuse nor neglect was found. Of the 920 children who were the subject of child abuse petitions, 55% were temporarily removed from their homes. Temporary removal ended with respect to 73% of the children removed within 90 days, and only 30% of the child abuse cases disposed of in

1977 ultimately resulted in placement outside the home. State of New York, Twenty-third Annual Report of the Judicial Conference and the Office of Court Administration, 1978, pp 39-43, 270 Broadway, New York, N.Y. 10007. The experience in 1976 was virtually identical to 1977. State of New York, Twenty-second Annual Report of the Judicial Conference and Office of Court Administration, 1977, pp 37-40.

A higher level of procedural protection in the summary seizure process is required here than in cases involving "merely shifting economic arrangements" Stanley v Illinois, 405 U.S. 645, 650-651

(quoting from Kovacs v Cooper, 336 U.S. 77, 95 (concurring opinion).)

Because the deprivation caused by the summary seizure of a child is so severe and the risks of an erroneous deprivation so high, the procedural protections provided by the state immediately after the seizure of the child should be designed to confirm as quickly as possible that the summary seizure "was necessary and justified in the particular instance" Fuentes v Shevin, supra, at 91, or that the child should be returned home promptly pending a hearing on the merits of any underlying child protective proceeding. A factually reliable decision as to the propriety of the removal as quickly as possible is in the state's interest as well, since it does not wish to separate and traumatize families unnecessarily, and

if financial considerations are relevant in this context, cf. Mathews v Eldridge, 424 U.S. 319, because the cost of foster care is exorbitant. See Fanshel, Dollars and Sense in the Foster Care of Children (Child Welfare League of America 1971).

Sections 17.01, 17.02 and 17.03 of the Texas Family Code require that immediately after a child is summarily seized by public officials, the child be brought before a court and that a petition for "protection of child in emergency" be filed at the same time. While Section 17.02 provides for a hearing to be held upon the filing of the petition, it does not specify exactly when the hearing is to be held; Section 17.03 provides that the hearing may be held without notice to the child's

parents.

The district court held that while the preliminary hearing on the child's seizure could be held ex parte, due process required that the state at least make reasonable efforts to notify the parents of this judicial review of the child's detention and that the hearing be held on "the very day" of the child's seizure, Sims v State Department of Public Welfare, supra, pp 1192-1193.

Appellants do not contest the notice requirement, but claim that due process does not require them to seek judicial approval of their seizure of a child on the very day of the seizure.

Amici believe that judicial review of the summary seizure of a child should be held at the earliest possible time.

The inherent danger of careless or erroneous use of emergency custody demands that such action be examined by a court as quickly as possible. One of the dangers -- that no legal action will be taken at all following the seizure of the child -- is illustrated by disturbing cases from several jurisdictions, Duchesne v Sugarman, 566 F. 2d 817 (2d Cir. 1977), In re Guardianship of Denlow, 384 N.Y.S. 2d 621__Misc. 2d__ (Fam. Ct. Kings County 1976), People ex. rel. Johnson v Michael, 39 Misc. 2d 365 (S. Ct. N.Y. Co. 1963), White v Minter, 330 F. Supp. 1194 (D. Mass. 1971), In re Willis, 207 W.E. 2d 129 (W. Va. Sup.Ct. 1973).

In Mitchell v W. T. Grant, 416 U.S. 600, this Court recognized that "judicial control of the process from beginning to end" would "minimize the risk that the ex parte seizure will lead to a wrongful taking." Id at 616-617. Significantly, the American Bar Association Juvenile Justice Standards Relating to Abuse and Neglect (Tentative Draft 1977) provide for a court review to determine whether emergency custody of a child should be continued on the first business day after the child is taken into custody or no later than the next business day. Standard 4.2.B and 4.3 pp 85-86.

It is difficult to argue meaningfully about the merits of "the very day" as opposed to the next business day. What is clear is that there must be a definite and very short limit on the time the state can hold a child without going to court. In the absence of such a limit, it cannot be assumed that unwarranted assumption of emergency custody will be noticed and terminated with all possible speed.

Despite their extensive experience with child protective cases, Amici have never known a Family or Juvenile Court judge to refuse to issue an ex parte removal order. The pressure to sign the order is enormous. One commentator reports on the practice of "shroudwaving." If a judge is reluctant to sign a removal

order, he is told "O.K.! Don't sign the order! But if the kid is brought in dead, don't blame us!"
Levine, Caveat Parens, supra, at p29 fn 148.

Because of the peculiar pressure on the Juvenile Judge confronted with an ex parte removal order, Amici believe that ex parte "judicial control" is less of a safeguard in child protective cases than in cases involving commercial interests, Mitchell v W.T. Grant, supra. Other safeguards, such as "an affidavit going beyond mere conclusory allegations and clearly setting out the facts," Id at 607, forming the basis of the summary seizure should be required. Further, it should be clear that even the ex parte "hearing" involves the taking of sworn testimony rather than merely the handing

up of papers for signature. State officers or representatives confronted with the requirement to produce facts from the very beginning would have to scrutinize more carefully the need for summary seizure. Whether or not the child's parents have received actual notice of the preliminary hearing pursuant to Section 17.02, they surely should be served with a copy of the removal order itself.

The ex parte removal order pursuant to Section 17.02 has a duration of 10 days only, according to Section 17.05. During these 10 days, a parent may move to modify the preliminary ex parte removal order. At the expiration of the 10-day period, if the state commences a plenary proceeding "affecting the parent-child relationship" pursuant to Chapter 11, the

state may obtain an additional 10-day ex parte removal order pursuant to Section 11.11(a)(4). The district court held that this scheme offended due process because it failed to provide parents a prompt adversary hearing on the propriety of the children's seizure and placed the burden of modifying the ex parte removal order on the parents.

The summary seizure of a child followed by an ex parte hearing provides parents no opportunity to be heard in opposition to the summary seizure of their child. But "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.... (And n)o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and

opportunity to meet it" Joint-Anti-Fascist Refugee Committee v McGrath, 341 U.S. 123, 170-172 (Frankfurter, J. concurring).

Not having provided the parent with any opportunity to prevent deprivation through the initial seizure process, notice and hearing on the propriety of the seizure must be granted so that the deprivation can still be limited or minimized. If arbitrary or erroneous deprivation through the summary seizure process is to be avoided, such a hearing must be held at a "meaningful time" Armstrong v Manzo, 380 U.S. 545, 552, that is within the shortest practicable time after the deprivation.

In Amici's experience, the fact that the parent may move to modify the ex parte removal order is of no moment. Amici have found that motions to modify are rarely made: parents simply do not know about them, and children remain in state custody on the basis of ex parte orders for substantial periods of time.

"In this situation, the state cannot constitutionally "sit back and wait" for the parent to institute judicial proceedings. It "cannot...(adopt) for itself an attitude of 'if you don't like it, sue.'" Kimbrough v. O'Neil, 523 F.2d 1056, 1060 n.3 (7th Cir. 1975) (Swygert, J., concurring). The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time. Cf. Fuentes v. Shevin, 407 U.S. 67, 83 n.13 (1972); Hernandez v. European Auto Collision, Inc., 487 F 2d 378, 385 n.4 (2d Cir. 1973) (Timbers, J. concurring)." Duchesne v.

Sugarman, 566 F2d 817, 828 (2d Cir. 1977).

The district court properly concluded that as a matter of due process, having summarily seized a child and secured an ex parte order of removal, the state must provide the parent with an adversary hearing on the propriety of the seizure no later than 10 days after the seizure of the child.

CONCLUSION

The judgment of United States District Court for the Southern District of Texas, Houston Division, should be affirmed.

Respectfully submitted,

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